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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD REGAN, Secretary of the Treasury, et al.,
Petitioners,

v.

RUTH WALD, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

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Questions Presented

Congress has enacted a series of measures since 1973 sharply limiting the President's authority to impose emergency restrictions on the activities of Americans at home and abroad, absent the existence of a genuine emergency and consultation with Congress.

Since this Court's decision in *United States* v. *Laub*, 385 U.S. 475 (1967), Congress repeatedly has refused to impose sanctions, criminal or otherwise, for violations of area restrictions on travel, despite open and widespread travel to Cuba and elsewhere in violation of such restrictions and general trade embargoes. In 1978, Congress largely repealed the authority previously delegated to the executive to impose area restrictions. With this background, this case raises four basic questions:

1. Are the executive's April 1982 restrictions on travel barred by the 1978 amendment to the Passport Act?

2. Are the regulations invalid because the Trading With The Enemy Act never authorized regulations criminalizing personal travel expenditures?

3. Since the executive failed to comply with the requirements of the International Emergency Economic Powers Act, are the 1982 Treasury regulations invalid because the authority to regulate travel to Cuba was not being exercised on July 1, 1977?

4. Do the regulations violate respondents' freedom to travel abroad in violation of the First and Fifth Amendments to the Constitution?

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Donald Regan, Secretary of the Treasury, et al.,

Petitioners,

v.

Ruth Wald, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

Statutes and Regulations Involved

The relevant statutes and regulations, in addition to those set forth by petitioners, are the International Emergency Economic Powers Act, 50 U.S.C. (Supp. V) §§ 1701 *et seq.* (IEEPA), and the Passport Act of 1926, 22 U.S.C. § 211a, as amended by the 1978 Foreign Relations Authorization Act § 124; Pub.L. 95-426, § 124, 92 Stat. 971, both reproduced in Appendix A *infra*, —— to ——.

Statement

A. *Statutory Background*

In the 1970's, Congress enacted a series of statutes designed fundamentally to reallocate authority over foreign policy from the executive to the legislature, to terminate the executive's unfettered discretion to exercise emergency authorities absent a genuine national emergency, and to limit the executive's authority to curtail the right to travel abroad.

1. In 1973, when a Senate Special Committee on the Termination of the National Emergency began its investigation, it found the field of emergency statutes and procedures in disarray. S. Rep. No. 922, 94th Cong., 2d Sess. 3 (1976).[1] The Special Committee concluded that even though no true national emergency existed, "[a] majority of the people of the United States have lived all of their lives under emergency rule. For 40 years, freedoms and governmental procedures guaranteed by the Constitution have, in varying degrees, been abridged by laws brought into force by states of national emergency." S. Rep. No. 549, 93rd Cong., 1st Sess. 1 (1973). Accordingly, in 1976, Congress terminated the powers and authorities available to the President as a result of the four existing states of national emergency and established procedures by which Congress could more tightly oversee the executive's future exercise of emergency authorities.[2] National Emergencies Act, Pub.L. No. 94-412, 90 Stat. 1255, 50 U.S.C. §§ 1601-1651 (1976) (NEA).

2. Congress next addressed the most fecund statutory source for the perpetual "emergency" regulations during the previous four decades: section 5(b) of the Trading With the Enemy Act (TWEA).[3] In 1977, Congress limited the TWEA authorities to actual wartime situations, and imposed procedural and substantive constraints on the

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[1] In 1973, Congress passed the first of the statutory limits on the President's delegated emergency powers, the War Powers Resolution, Pub.L. No. 93-148, 87 Stat. 555, *codified as amended at* 50 U.S.C. §§ 1541-1548, which restricted the president's power to employ United States forces abroad.

[2] The NEA terminated, two years from the date of enactment, powers and authorities available to the executive pursuant to 470 statutes, as a result of the four states of national emergency in force. 50 U.S.C. § 1601. *See* S. Rep. No. 549, 93rd Cong., 1st Sess. 1 (1973). The legislation also provided for congressional review every six months of future Presidential declarations of emergency and congressional oversight of and accountability for actions taken by the executive in the exercise of delegated emergency powers. 50 U.S.C. § 1621.

[3] Congress had exempted TWEA § 5(b) from the NEA reform pending further study. *See infra* at 34-39.

executive's peacetime use of emergency authorities. *See* International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625, 50 U.S.C. (Supp. V) §§ 1701 *et seq.* (IEEPA).[4] Under IEEPA, the President may exercise emergency authorities only if he declares a national emergency with respect to a specific "unusual and extraordinary threat," consults with Congress before exercising emergency authorities, and reports to Congress every six months; Congress may terminate the declaration by concurrent resolution.[5] The TWEA amendments included a narow "grandfather" or "savings" clause intended to phase out existing regulations promulgated under TWEA § 5(b). *That clause preserved only the § 5(b) authorities exercised by the executive on July 1, 1977.* Because the executive was not exercising authority to embargo travel to, or travel-related transactions with, Cuba on July 1, 1977, that authority was not grandfathered.

B. *Executive Control Over Travel to Cuba*

In 1963, in the aftermath of the Cuban missile crisis, the executive exercised its TWEA powers by promulgating the Cuban Assets Control Regulations, 31 C.F.R. Part 515,[6] which imposed a commercial and financial embargo against Cuba.[7] At the same time, based in large part on the ground that the travel of United States citizens could financially assist Cuba in exporting revolution, the Presi-

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[4] *See* App. *infra* at 1a-4a.

[5] This case does not require this Court to decide whether the provision for termination by concurrent resolution survives *INS v. Chadha*, —— U.S. ——, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983).

[6] 28 Fed. Reg. 6975 (1963).

[7] The OAS resolutions upon which the government relies, Br. 3 n.3, were effectively repealed by Resolution I of the Sixteenth Meeting of Consultation of Ministers of Foreign Affairs (July 29, 1975). The State Department has stated that the 1975 resolution "ended the diplomatic and economic sanctions of the OAS, imposed against Cuba in 1964" and "terminated the OAS requirement of diplomatic and economic sanctions against Cuba." Department of State, *1975 Digest of United States Practice in International Law* 20, 25, 691 (1976).

dent, pursuant to the Passport Act, 22 U.S.C. § 211a, imposed passport restrictions on such travel.[8] For virtually all of the next fourteen years, until the executive's delegated authority to impose area restrictions on passports was severely curtailed by Congress, United States passports were not valid for travel to Cuba.

The original embargo regulations imposed under the TWEA did not mention travel; nor did any amendment to those regulations' purport to forbid travel to Cuba. Treasury's licensing of business travel expenditures was done automatically upon State Department passport validation; there is no evidence that Congress was informed of this practice.[10]

On March 9, 1977, President Carter announced the removal of all restrictions on travel to Cuba in order to comply with the Final Act of the Conference on Security and Cooperation in Europe (1975) (Helsinki accords), which called for freedom of international movement and communication.[11]

The following year, Congress amended the Passport Act to remove the executive's ability to impose area restrictions on travel except during war, armed hostilities, or imminent danger to the public health. Pub. L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211a (1978). Congress, too, acted expressly to achieve greater United States compliance with the Helsinki accords, and to encourage the compliance of other nations as well. Congress believed that "the freedom-of-travel principle is sufficiently important that it should be a matter of law and not dependent upon a particular

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[8] *See infra* at 18-19.

[9] In 1980, 63 years after TWEA's enactment and under the hydraulic pressure of the Iranian crisis, the government invoked IEEPA in an open attempt to ban all travel to Iran. Exec. Order No. 12211, 45 Fed. Reg. 26685 (1980); 45 Fed. Reg. 29287, *adding* 31 C.F.R. § 535.428 (1980) (restricting fully sponsored travel).

[10] *See generally infra* Point II.

[11] *See* 73 Dep't State Bull. 323 (1975) (text of Helsinki accords).

Administration's policy." S. Rep. No. 842, 95th Cong., 2d Sess. 14 (1978). Thus, for all purposes relevant here, Congress repealed the mechanism previously relied on by the executive for every travel restriction imposed during our nation's history, including those issued from 1963 to 1977 to bar travel to Cuba.

Given the 1978 amendment, the current administration was forced to look elsewhere in its desire to restrict travel to Cuba. It therefore promulgated new regulations, claiming authority under TWEA to prohibit all transactions in connection with travel to Cuba,[12] the first explicit attempt in American history to use the TWEA to restrict the travel of Americans.[13] This action, which represented a change in administration policy,[14] was not founded on any declaration of national emergency.

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[12] 50 U.S.C. App. § 16 makes a willful violation of any provision of the TWEA punishable by a $50,000 fine or imprisonment for ten years, or both.

The only method of travel control which the executive had ever before attempted to enforce through criminal sanctions was the regulation of passports. In *United States* v. *Laub*, 385 U.S. 475, 485 (1967), this Court held that the statute relied on by the government to prosecute travel to Cuba, 8 U.S.C. § 1185, did not in fact make such travel a crime, and noted that "the State Department had consistently taken the position that there was *no statute* which imposed or authorized" criminal sanctions upon violation of area restrictions [emphasis added].

[13] The government initially advised persons inquiring that 31 C.F.R. § 515.560 bars travel even if it results in no financial transfers beneficial to Cuba. *See* JA 18 (Mayerson Affidavit); *see also* JA 25 (Treasury Department Statement). Only later, when respondents' counsel asserted that this broad claim showed a governmental intention to bar travel *qua* travel, did the government state that it would not prosecute hosted travel, although not disclaiming authority to do so. This position was later confirmed by regulation, 47 Fed.Reg. 32060 (1982), *codified at* 31 C.F.R. § 515.560(j) (Pet. App. 1).

[14] *See* Dickey, *Central America: From Quagmire to Cauldron?*, 62 Foreign Affairs 659 (1984).

C. *Proceedings Below*

Respondents are American citizens who seek to travel to Cuba for educational, political and religious reasons, and not-for-profit organizations engaged in educational research on Cuba. They include a lawyer, religious leaders and university professors. It is undisputed that respondents' purpose was neither business nor holiday travel, but rather to learn about Cuba, its people and culture, and to establish political contact with the Cuban people.[15] They instituted this suit seeking, on statutory and constitutional grounds, declaratory and injunctive relief against the executive branch's regulations restricting travel.

A unanimous court of appeals ordered the district court to issue the preliminary injunction.[16] The opinions of the court of appeals are a model of judicial analysis based on a careful review of the statutory language, the extensive legislative history, administrative practice, and this Court's rules of statutory construction.[17] Pet. 1a-19a.

The court of appeals held that the Cuban travel regulations lacked statutory authority because the Treasury had failed to "follow the 'consultative' procedures mandated" by IEEPA—"procedures aimed at focusing the attention of Congress as well as the President on the need for the restrictions of the sort at issue here." Pet. 2a. It further held that the regulations were invalid because the grandfather clause amendment to TWEA preserved only those regulations extant on July 1, 1977, and the government on that date was not regulating travel to Cuba.

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[15] JA 2 (Complaint); *id.* at 32-90 (affidavits).

[16] The appellate court subsequently issued a memorandum opinion unanimously denying both the government's petition for rehearing and its suggestion for rehearing *en banc*. Supplemental Opinion, Pet. 18a-19a.

[17] The only other court of appeals which has considered the issue unanimously agreed that the position the government advances here was contrary to the legislative history and purpose of the TWEA's grandfather clause and its function within the broader statutory scheme. *United States* v. *Pryde*, 703 F.2d 1267, 1268-69, *reh. denied*, 717 F.2d 1401 (11th Cir. 1983).

Summary of Argument

This case presents a collision between the Treasury's regulations of April 1982, and two important constitutional principles: the right to travel and the doctrine of *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), that bars the President from issuing regulations contrary to the express will of Congress.

I.

In fulfillment of the 1975 Helsinki accords, President Carter on March 9, 1977 announced the removal of "*any travel restrictions* on American citizens who want to go to . . . Cuba." [18] In 1978, Congress amended the Passport Act to limit the executive's authority to restrict travel to particular countries absent certain extraordinary circumstances not present here. That amendment's express purpose was to safeguard the "freedom-of-travel principle" from the vagaries of "a particular Administration's policy." [19] The Treasury Department, attempting to circumvent the clearly expressed intent of Congress, promulgated the April, 1982 regulations—which the Government concedes will "eliminate tourist and business travel" to Cuba—under the criminal provisions of TWEA § 5(b). JA 25. The specific Congressional policy protecting freedom of travel against area curtailments must take precedence over the general provisions of the TWEA. The 1978 amendment would have no meaningful effect whatsoever were the Court to hold that restrictions on travel to Cuba far more draconian than the civil deterrent outlawed by Congress could be reimposed at any time the executive so desires.

II.

Notwithstanding this explicit protection of the right to travel, petitioners argue that TWEA § 5(b) authorized

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[18] President's News Conference of March 9, 1977, 13 Weekly Comp. Pres. Doc. 328-29 (March 14, 1977) [emphasis added].

[19] S. Rep. 842, 95th Cong., 2d Sess. 14 (1978).

the April 1982 regulation curtailing that right and that the grandfather clause in the 1977 TWEA amendment preserved that authorization. In fact, neither the Congress that passed the TWEA nor later Congresses ever explicitly or impliedly authorized the executive to issue travel-curtailing regulations under the TWEA § 5(b). By enacting two explicit travel control provisions—one in another section of the TWEA and the other in a separate wartime statute—the same Congress that enacted the TWEA indicated its understanding that § 5(b) did not reach travel-related transactions. Since the TWEA's passage in 1917, the executive has never enforced it against the thousands of persons who have openly traveled to nations subject to trade and finance embargoes. Indeed, in *United States* v. *Laub*, 385 U.S. 475 (1967), this Court noted that "the State Department has consistently taken the position that there was *no statute* which imposed or authorized criminal sanctions for violations of geographic travel retrictions." *Id.* at 485 [emphasis added]. During hearings on bills to provide criminal sanctions—bills which were introduced in every Congress from 1958 until 1976—no administration witness ever suggested that the TWEA authorized such sanctions.

III.

In any event, the court below was correct in holding that the 1982 regulations are barred by the 1977 amendment of TWEA and enactment of IEEPA.[10] That legislation had the paramount purpose of terminating the executive's discretionary, unreviewable, and, in the eyes of the key participants in the legislative process, constitutionally suspect use of TWEA § 5(b) emergency authorities as a flexible tool of non-emergency foreign policy. Finding that there was no genuine extant national emergency, Congress included in the TWEA amendments a

[10] The First Circuit's reasoning was adopted in the equally thorough and careful opinion of the Eleventh Circuit in *United States* v. *Frade*, 709 F.2d 1387 (11th Cir. 1983).

narrow grandfather clause in order to preserve existing regulations promulgated under § 5(b). In a compromise reached in the responsible House subcommittee, Congress permitted the President to continue specific existing regulations only to avoid compelling him either to relinquish diplomatic bargaining chips unilaterally or to release assets against which American claimants might recover. Further, having no desire to perpetuate the executive's spurious declarations of national emergency, Congress imposed a national interest standard, rather than a national emergency standard, for the executive's invocation of the grandfather clause. The general purposes of the 1977 legislation and the specific, limited purpose of the grandfather clause are thus fully concordant with the pervasive statements in the legislative history limiting the grandfathered regulations to the specific ones in effect on July 1, 1977. Because the President was not regulating travel to Cuba on that date, his authority to do so was not preserved by the grandfather clause.

IV.

The court below correctly invoked the constitutional right to travel in support of its narrow construction of the grandfather clause. We submit, further, that the Constitution bars the 1982 regulations' criminalization of travel to Cuba. These criminal provisions are a far more severe abridgement of the right to travel than the passport denials at issue in *Kent* v. *Dulles*, 357 U.S. 116 (1958), and its progeny. Unlike *Zemel* v. *Rusk*, 381 U.S. 1 (1965), and *Haig* v. *Agee*, 453 U.S. 280 (1981), the government interest in this case is insufficient to justify such an abridgement. The routine foreign policy interest asserted here pales beside the unparalleled emergency of the Cuban missile crisis, the context of the area restrictions upheld in *Zemel*. Indeed, the 1982 regulations bear only a negligible relationship to the government's purported interest in stopping the flow of currency to Cuba; the government also has at its disposal less restrictive means of serving that interest, means which do not curtail the right to travel.

ARGUMENT

I.

The Travel-Restricting Regulations Promulgated by the Executive Branch Are in Irreconcilable Conflict With and Barred by the 1978 Congressional Amendment to the Passport Act, 22 U.S.C. § 211a.

Prior to 1978, the Passport Act, 22 U.S.C. § 211a, authorized the Secretary of State to "grant and issue passports . . . under such rules as the President shall designate and prescribe. . . ." In 1978, Congress amended the Act to limit the executive's authority to restrict travel to particular countries absent certain extraordinary circumstances:

> Unless authorized by law a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of the United States travellers.

Pub. L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211a (1978).

Notwithstanding express congressional intention to guarantee a right to travel except in those three emergency circumstances specified by statute, the Treasury Department has promulgated travel-restricting regulations with respect to Cuba which the Government concedes will "eliminate tourist and business travel to that country," and, indeed, were admittedly enacted for that very purpose. JA 25. In so doing, it is attempting to circumvent the clear intent of Congress as expressed in the 1978 amendment. The specific policy protecting freedom of travel to Cuba expressed in the 1978 amendment must take precedence over the executive's misreading of the general provisions of the TWEA. *See, e.g., Middlesex County Sewerage Authority* v. *Sea Clammers Association*, 453 U.S. 1 (1981); *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

A. The purpose of the 1978 amendment was not merely to govern the issuance of passports, but rather to guarantee by statute the right to travel except in three situations concededly not present here. By ignoring the express will of Congress to protect what it called "freedom of travel," S. Rep. No. 842, 95th Cong., 2d Sess. 14 (1978), Treasury's regulations transform this carefully considered congressional enactment into an exercise in legislative futility and trivia.

The congressional intent must be examined against the background of *Zemel* v. *Rusk*, 381 U.S. 1 (1965), where this Court concluded that Congress had delegated to the executive the power to deter travel to Cuba by refusing to validate passports for travel there. *Id.* at 7.[11] Renouncing any intention of utilizing even that limited power, President Carter on March 9, 1977 "instructed the Secretary of State to remove any travel restrictions on American citizens who want to go to . . . Cuba," to fulfill his pledge of United States compliance with the Final Act of the Conference on Security and Cooperation in Europe (1975) (the Helsinki accords).[12]

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[11] In *Zemel*, the Court relied on both the broad language of the congressional grant of power and the apparent congressional approval of the executive's settled and publicized practice of declaring passports invalid for the travel of United States citizens to particular countries. 381 U.S. at 8-12. Subsequently, the Court clarified the reach of its holding in *Zemel* when it decided that violation of an executive order or regulation barring the use of passports for travel to particular countries was not criminally punishable. *United States* v. *Laub*, 385 U.S. 475 (1967). The geographical restrictions upheld in *Zemel*, then, were not a "travel ban" as they are usually referred to, but a deterrent, less severe than a ban on travel.

[12] President's News Conference of March 9, 1977, 13 Weekly Comp. Pres. Doc. 328-29 (March 14, 1977). Strengthening the right to travel was a principal purpose of the Helsinki accords, *see, e.g.*, Dep't of State, *1975 Digest of United States Practice in International Law* 7 (1976) (statement of Helsinki accords' protection of "right to travel" by President Ford), and President Carter's action was taken just in time for the scheduled compliance review to be held in Belgrade in 1977. *See generally* Turock, *Freedom of Transnational Movement: The Helsinki Accords and Beyond*, 11 Vand. J. Transnational Law 585, 590 (1978).

Pursuant to his instructions, the State Department allowed its own semi-annual geographic travel restrictions to expire on March 18, 1977,[33] and, consistent with President Carter's instruction *to the State Department* to abolish not simply passport restrictions but "*any* travel restrictions" [emphasis added],[34] evidently assumed responsibility for the removal of any ancillary and subsidiary restraints on the right to travel implemented by other departments.[35]

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[33] 76 State Dep't Bull. 346 (1977). The requirement of periodic issuance appears at 22 C.F.R. Part 51 (1974-77). The last such notice regarding Cuba appears at 41 Fed. Reg. 41105.

[34] *See e.g.*, 13 Weekly Comp. Pres. Doc. 328 (announcing "removal of travel restrictions;" decision to "remove any travel restrictions on American citizens who want to go to . . . Cuba"). *See also id.* at 290-91, 360, 645 ("there are *no prohibitions* against American citizens traveling in the world, initiated by the United States" [emphasis added]); *id.* at 526 ("I have removed restrictions on United States citizens who want to travel abroad. Today there are *no restrictions* imposed by our country" [emphasis added]).

The government's claim that "[i]n March 1977, President Carter decided to modify United States policy with respect to economic transactions incident to travel to Cuba," Br. 8, is thus contrary to the historical record. To be sure, the self-serving gloss thus put on President Carter's March 1977 actions is necessary for the government to avoid the impact of the 1978 amendment, but the facts show without contradiction that the abolition of travel controls to Cuba in March 1977 was motivated by an intention to allow those Americans who wished to travel to Cuba to do so without any governmental restraint—not a temporary desire to adjust the economic embargo. Indeed, no restrictions on economic transactions with Cuba by American citizens (*i.e.*, trade restrictions, banking restrictions, or restrictions concerning blocked assets) were ever lifted by the Carter administration. *See, e.g.*, 78 State Dep't Bull. 57 (1978) (summarizing embargo policy).

[35] For more than a century the State Department has had primary responsibility for determining, as a matter of policy subject to presidential direction, the scope of travel control of United States citizens by whatever means. Thus, the State Department's March 18, 1977 press release stated: "Revisions of the Department of the Treasury licensing procedures affecting the expenditure of funds in the aforementioned countries are in preparation." 76 State Dep't Bull. 346 (1977). Consistent with the announcement, the Treasury Department advised the public on March 29, 1977

Shortly thereafter, President Carter announced his support of legislation which would protect by law travel to Cuba and other countries.[36] Following the President's lead, Congress in 1978 enacted the amendment to the Passport Act.[37] Passing by a substantial margin in both houses with no floor opposition, its legislative history shows that Congress' unequivocal purpose was to prohibit the executive from regulating travel by area restrictions in the absence of war or armed hostilities. The Senate Committee on Foreign Relations began its discussion of the amendment by summarizing the history of the executive's geographic travel limitation authority:

> Before March 1977, U.S. Presidents had for many years used the passport authority to designate certain countries into which the use of a U.S. passport for travel was not authorized. Although *U.S. courts eventually ruled that U.S. law did not actually restrict the travel of a U.S. citizen to any foreign country or area,* the designation regarding the use of U.S. passports in certain countries remained in effect. In March

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that transactions incident to travel were not subject to the governmental regulation or control. 42 Fed. Reg. 16621 (1977). Throughout the Cuban embargo, any control over transactions involving travel expenditures exercised by the Treasury Department was ancillary to the primary controls imposed by the State Department. *See Wald* v. *Regan*, Pet. 6a.

[36] Citing "a need to change basic American law that was written during the cold war" to remove "all restrictions on travel, except those that have to be," President Carter proposed largely repealing the grant of geographic travel control authority this Court had recognised in *Zemel* v. *Rusk*. 13 Weekly Comp. Pres. Doc. 645 (May 3, 1977).

[37] In so doing, Congress expressly referred to "the purpose of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for the purpose of encouraging other countries which are signatories to the Final Act to comply with those provisions. . . ." Pub. L. 95-426, § 124, 92 Stat. 971, 22 U.S.C. § 211a (1978).

> 1977, however, pursuant to a campaign pledge, the President abolished all such restrictions regarding U.S. citizens traveling to specified countries.
>
> Earlier this year, in response to a commitee inquiry, the State Department stated as follows: "In view of the Administration's views on the general principle of freedom of travel, there is no present prospect for the re-establishment of such restrictions." *While fully supporting the Administration's policy, the committee believes that the freedom-of-travel principle is sufficiently important that it should be a matter of law not dependent upon a particular Administration's policy.*

S. Rep. No. 842, *supra* [emphasis added].[38]

The Committee observed that while it had no

> wish to limit the President's ability to deter U.S. citizens from entering countries with which the United States is at war or regions where there are occurring hostilities which relate to American foreign policy interests . . . [it could] conceive of no sound reason, however, for the re-establishment of a U.S. passport policy which identifies certain countries as being politically or ideologically taboo.

Id.

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[38] The amendment to § 211a was not debated on the floor of either chamber. The sections of the Senate Report set forth in the text thus represent virtually the entire substantive legislative history of the amendment, although the transcript of the *Conference on H.R. 12598 before the Comm. on Foreign Relations and House Comm. on International Relations* 40-43 (1978) also illustrates congressional concern, in considering the amendment, with protecting the right of personal travel. *See also* transcripts of *Hearings before the Subcomm. on International Operations of the Comm. on Foreign Relations, Markup of S. 2933* (authorizing 1979 appropriations for the Department of State) (May 3, 9, and 10, 1978).

B. Petitioners argue that the TWEA need not be harmonized with the Passport Act amendment because the latter "does not purport to limit the President's authority to regulate property transactions under the TWEA." Br. 58. This Court, however, has not hesitated to modify even crystal clear provisions of an earlier statute when the legislative *purpose* and *policies* of a later enactment so demand, even when the terms of the later statute do not expressly mandate such a modification. For example, in *Boys Markets, Inc.* v. *Retail Clerks Union, supra*, the Court was faced with the question whether the "literal terms" of the Norris-LaGuardia Act (barring federal courts from issuing injunctions in labor disputes) were modified by § 301(a) of the Labor Management Relations Act, whose terms did not address the question. The Court held that the terms of the earlier statute were modified because congressional labor policy had shifted from protection of the nascent labor movement to promotion of industrial peace and stability. 398 U.S. at 250-51. The Court stated:

> Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions [citations omitted].

Id.

Since the 1978 statute, read in the light of its legislative history, was concededly passed to prohibit the executive from even *deterring* travel to Cuba, surely it must be held to bar the direct imposition of far more drastic travel controls through the back door. Under any realistic reading, the sole purpose behind the 1978 amendment cannot be given any effect without invalidating the present regulation.

We do not believe that this conclusion can be avoided by incantation of the canon that repeals by implication are

disfavored." Even under the usual standards for finding a partial repeal by implication, we think that the 1978 amendment plainly repeals any authority the executive might otherwise have drawn from the TWEA to impose criminal penalties for the mere spending of money in connection with personal travel to Cuba, since that TWEA authority could not be preserved without "ignor[ing] both the history and purposes" of the 1978 amendment. *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974).

Congress expressly recognized in 1978 that "U.S. law [does] not actually restrict the travel of a U.S. citizen to any foreign country or area," S. Rep. No. 842, *supra*, at 14, a conclusion based soundly on *United States* v. *Laub*, *supra*. Nevertheless, Congress passed the 1978 amendment eliminating even the power to deter travel which *Laub* had preserved, so that President Carter's renunciation of that limited *deterrent* power would be fixed into law and not subject to changes of administration or policy. Congress would hardly have gone to the trouble of cabining the President's power even to *deter* travel to Cuba, if, as the government claims, Br. 58, the President retains the power absolutely to restrain such travel under the amorphous "national interest" standard of the TWEA. Nor is it likely that the express commitment Congress made to comply with the Helsinki agreement was only a hollow promise. In short, the power petitioners claim under the TWEA is irreconcilable with the 1978 amendment of § 211a, and renders that statute a meaningless exercise.

Where, as here, Congress has acted to preserve the liberties of Americans by overruling one of this Court's statutory decisions, surely that congressional action should

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" To begin with, that doctrine would be relevant in assessing the effect of the 1978 amendment only if, as is decidedly not the case, Congress had plainly authorized the imposition of controls on travel through currency restrictions. In fact, however, there is no congressional authorization for the present regulation even absent the 1978 statute. *See generally infra* Point II.

not be interpreted in a crabbed and grudging manner. *Cf. Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, —— U.S. ——, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983) (broadly construing statute passed overruling Supreme Court decision).[20]

C. In the court below, petitioners suggested that the 1978 amendment could be harmonized with the power to control travel it contends the TWEA affords. The suggestion was that the two statutes dealt with essentially different subjects—§ 211a with travel restrictions in normal times and the TWEA with travel restrictions in emergencies. The 1978 amendment, however, did *not* address non-emergency situations, leaving emergencies to the TWEA or IEEPA. On the contrary, area restrictions on travel by their very nature were always undertaken to respond to some perceived emergency, and the very purpose of the 1978 amendment was to define the only emergencies in which area restrictions could be imposed, all of which are concededly absent here. *Cf.* 50 U.S.C. § 1701 (narrowly defining emergencies under IEEPA). Absent any of these emergencies, geographic travel restrictions are simply barred.

Nor can the 1978 amendment and the authority claimed under the TWEA be harmonized by contending that Congress would have considered the former to deal only with travel, while the latter authorized purely economic regulations (including, under the government's view, regulations whose impact on travel is far more effective a restraint on travel than direct State Department travel controls).

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[20] In circumstances of far more pressing executive need, where the congressional judgment was plainly not to grant the executive power which it believed to be necessary in wartime for the national security, this Court gave full effect to the congressional decision and ruled the exercise of such power ultra vires. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 586-89 (1952); *id.* at 598-609 (Frankfurter, J., concurring); *id.* at 637-46 (Jackson, J., concurring).

First, every commentator, and evidently every prosecutor, who had ever examined the matter determined that the TWEA was not intended to authorize regulations barring the spending of money for traveling, especially where the very purpose and intended effect of those so-called "economic" regulations was to prohibit travel.[31] Second, Congress has consistently, in reviewing compliance by other nations with the Helsinki agreement, treated economic restrictions on travel similar to those at issue here as contrary to Helsinki's provisions on freedom of movement.[32]

Finally, and perhaps most importantly, the alleged distinction between the "political" reasons for which the State Department's restrictions were imposed and the so-called "economic" reasons for which the present regulations were issued does not exist. The rationales for both the previous travel ban and the present travel-restraining regulations are equally economic and political. Economic embargoes and State Department travel controls have commonly gone hand-in-hand. The State Department's justification for its ban on travel to Cuba in the 1960's was precisely the same—nearly *in haec verba*—with petitioners' justification here.[33] Indeed, the State Department's own pronounce-

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[31] *See generally* Part II, *infra*.

[32] *See, e.g.*, Commission on Security and Cooperation in Europe, *Implementation of the Final Act of the Conference on Security and Cooperation in Europe: Findings and Recommendations Two Years After Helsinki, Report Transmitted to the House Comm. on International Relations*, 95th Cong., 1st Sess. 91 (1977) ("obstacles to travel by Soviet citizens in the West include . . . the small . . . currency allowance"); *id.* at 98 (similar Czechoslovakian restrictions); *id.* at 104 (Hungary); *id.* at 109 ("one considerable restriction [of Poland] is that of foreign exchange . . . ").

[33] *Compare* Department of State, *Passport Restrictions on Travel to Certain Areas* 1 (April 25, 1966) ("to limit the Castro regime's efforts to promote subversion in other countries . . . ") *with, e.g.*, Declaration of Myles Frechette, JA 107 ("[t]he regulations at

ments in imposing travel bans to Cuba and other nations consistently belie the government's present attempt to distinguish between those prior travel restrictions now foreclosed by § 211a and the current Treasury regulations "adopted as a means to impose additional economic costs upon Cuba. . . ."[14]

The challenged regulations do not have merely a remote or incidental effect on the subject of the 1978 amendment; they have precisely the same purpose and effect as did the earlier regulations which Congress has now forbidden. The regulations act as a complete proscription of travel punishable by far more stringent penalties than this Court has already found Congress to have denied. *United States* v. *Laub, supra.*

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issue in this case involve *a partial return to the . . . restrictions on travel related transactions which were in effect between 1963 and 1977.* They were adopted as a means to impose additional economic costs upon Cuba in the face of that country's promotion of armed violence, terrorism, and instability . . ." [emphasis added]). *See generally* JA 106-121, 171-83 (affidavits of government officials reciting political purposes for the present regulations).

[14] Indeed, when the State Department repeatedly sought a criminal penalty for violation of its geographic travel controls in the mid-1960's its principal justification was that such effective controls were needed to deprive affected nations of revenues from tourism. *See, e.g., Proposed Travel Controls: Hearings on S. 3243, Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 44-45 (1966); 56 State Dep't Bull. 102, 103 (1967); Statement of Asst. Sec. for Inter-American Affairs, Dep't of State, *United States-Cuba Trade Promotion: Hearing Before Subcomm. on Int'l Trade & Com. of the House Comm. on Int'l Relations, House of Representatives*, 94th Cong., 2d Sess. 27 (1976). *See also Area Restrictions and the Right to Travel Abroad*, 8 U. C. Davis L. Rev. 401, 423 (1975); Velvel, *Geographic Restrictions on Travel: The Real World and the First Amendment*, 15 U. Kan. L. Rev. 35, 44 (1966); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1147 (1971); Comment, *Executive Restrictions on Travel: The Passport Cases*, 5 Hous. L. Rev. 499, 511-512 (1968).

The Court must give meaningful effect to § 211a, as amended. *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 560 (1963). Respectfully, we do not believe that the 1978 amendment would have any meaningful affect whatsoever were the Court to hold that, despite its enactment into law, restrictions on travel to Cuba far more draconan than those outlawed by Congress could be re-imposed at any time the executive so decides.[25]

[25] Although it is not at issue in this case, we believe that the 1978 amendment bars not only these TWEA regulations but would also bar the promulgation of similar regulations under IEEPA, which was enacted in 1977. The government's contention, Br. 58, that the court of appeals held to the contrary is in error. We understand the First Circuit to have held only that the present regulations are in excess of statutory authority, and to have left for another day the question—whose answer would have been *dicta* in any event—whether the President could have issued similar regulations in consultation with Congress under IEEPA. *See Weld* v. *Reagan*, Pet. 2a.

II.

The TWEA Was Not Intended to and Did Not Make It a Crime to Travel to "Enemy" Countries or to Spend Money in Connection With Such Personal Travel.

A comprehensive report issued in 1958 by a distinguished Special Committee appointed by the Association of the Bar of the City of New York, after examining all of the administrative and legislative materials and consulting high-ranking government officials on travel control, concluded that the "[Trading with the Enemy] Act was never intended to be used as a device for the regulation of travel. . . ." Association of the Bar of the City of New York, *Freedom to Travel* 72 (1958).[16] That conclusion, joined by every commentator, was soundly based on the language, purpose, and legislative history of the TWEA. Since 1958, hundreds of Americans, despite substantial public and congressional criticism, have openly traveled to countries subject to trade embargoes (*e.g.*, China, Cuba, and North Vietnam). The legislative and executive responses to that travel, including lengthy congressional hearings, confirm that the TWEA does not authorize restrictions on personal travel expenditures.

A. Whatever control of travel the United States government exercised either directly or indirectly prior to World War I was wholly entrusted to and exercised by the Secretary of State under the Passport Act of 1856.[17]

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[16] The conclusion of the Special Committee that the Trading With the Enemy Act was not intended to regulate travel, has been supported by every scholarly commentator who has subsequently addressed the issue. *See* Gould, *The Right to Travel and National Security*, 1961 Wash. U.L.Q. 334, 364 n. 135; Note, *Constitutional Protection of Foreign Travel*, 81 Colum. L. Rev. 902, 930, 931 (1981); Levitt, *Legality of the Ban of Travel to Iran*, 12 Colum. Hum. Rts. L. Rev. 91, 99-100 (1980).

[17] *See Haig* v. *Agee*, 453 U.S. 280, 293-95 (1981); *Kemel* v. *Rusk*, 381 U.S. at 8; *Freedom to Travel*, *supra*, at 6-9.

The enactment of the TWEA in 1917 (which was undertaken largely to ameliorate, not tighten, common law rules[38] on trading with the enemy) gave the government no authority to prohibit transactions in connection with personal travel. The President was delegated extensive powers under the TWEA, but the scope of those powers was repeatedly and authoritatively described as involving *commercial* intercourse.[39]

The conclusion that the TWEA as enacted did not authorize restrictions on personal travel need not rest, however, on either the general unsuitability of its language for that purpose[40] or the incompatibility of such a regulation with the commercial and mercantile purpose of the TWEA in general, and § 5(b) in particular. The Congress that enacted the TWEA knew how to write a travel control measure in clear and direct terms. Its passage of two such statutes—one involving aliens in another section of the TWEA itself,[41] and a second governing the travel of

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[38] *See, e.g., Committee Print of the House Subcomm. of Int'l Trade and Com. of the Comm. on Int'l Relations, Trading With The Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency*, 94th Cong., 2d Sess. 47-48, 81, 158-60, 179 (1976) [hereinafter "Committee Print"].

[39] *See, e.g.*, 55 Cong. Rec. —— (1917), *reprinted in* Committee Print at 47-48 (remarks of Rep. Montague, the bill's sponsor); *id.* at 81 (remarks of Rep. Snook); Sen. Rep. No. 133, 65th Cong., 1st Sess. (1917), *reprinted in* Committee Print at 158 (remarks of Rep. Montague); H.R. Rep. No. 85, 65th Cong., 1st Sess. (1917), *reprinted in* Committee Print at 179.

[40] The government's contention that personal travel expenditures may be prohibited as "transactions involving . . . property in which any [designated] foreign country has any interest," Br. 20 n.21, is a conceivable, but strained and artificial reading of the statutory language. The government's construction is so broad as to call into play *Kent's* rule that power to control travel cannot be delegated too broadly and that the Court will narrowly construe all such delegations. *Kent* v. *Dulles*, 357 U.S. at 116, 128-29 (1957).

[41] Section 3(b), now codified at 50 U.S.C. App. § 3(b), makes it unlawful for any person, except with the license of the President,

Americans generally in a separate wartime statute—is wholly inconsistent with the suggestion that § 5(b) of the TWEA can be used to prohibit personal travel expenditures. Indeed, in enacting the latter measure, Congress explicitly noted that restricting American citizens' travel was beyond the TWEA's authority.

In that measure, which this Court has called "the first travel control statute," *Haig* v. *Agee*, 453 U.S. at 296, the 65th Congress acted "[t]o Prevent in time of war departure from or entry into the United States contrary to the public safety." Act of May 22, 1918, ch. 81, §§ 1-2, 40 Stat. 559. This statute made it unlawful "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe," for "any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport." *Id.* Enactment of this legislation just seven months after the TWEA, and by the same Congress, demonstrates contemporaneous congressional recognition that the TWEA was not meant to, and did not, reach travel. The congressional reports explicitly confirm this construction.[42]

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to transport or attempt to transport into or from the United States, or for any owner, master, or other person in charge of a vessel of American registry to transport or attempt to transport from any place to any other place, any subject or citizen of an enemy or ally of enemy nation, with reasonable cause to believe the person transported or attempted to be transported is such a subject or citizen. (*See* H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3 (1918) (discussing Section 3(b) of the TWEA)).

[42] The House Report accompanying the travel control bill highlights congressional recognition that the TWEA did not address or provide for restrictions on travel:

> This bill is intended *to stop an important gap* in the war legislation of the United States. [Some journeys by *alien* enemies] are now partially restrained by section 3(b) of the Trading With The Enemy Act. *Even this act leaves American citizens and neutrals perfectly free to come and go.* . . . The Attorney General has formally ruled that neither the President nor the

B. From its passage in 1917 until the 1970s, not a single public action by the executive branch or word uttered in Congress suggests that the TWEA could be used to regulate or prohibit personal travel expenditures.

There was no use of the TWEA for travel transactions in World War II. To the contrary, even during that enormous crisis, President Roosevelt's executive order exempted from embargo $500 monthly for "living and traveling expenses . . . within *any* foreign country," including all countries subject to German control. General License No. 33, pursuant to Exec. Order No. 8389, 3 C.F.R. 645 (1940) (Sept. 10, 1940, amended, Oct. 23, 1941). *See generally* 28 Fed. Res. Bull. 1088 (1942).[42]

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executive departments have power to curb the general departure and entry of travelers.

New legislation is the only remedy. In his address to Congress on December 4, 1917, the President emphasized the necessity of creating "a very definite and particular control over the entrance and departure of all persons into and from the United States." The Attorney General in his report for 1917 made a similar recommendation . . . [Existing regulations of alien travel and Section 3] of the Trading With The Enemy Act represent practically the only existing enforceable provisions for controlling foreign travel. *It will be noted that they apply exclusively to persons who by birth or citizenship are directly connected with hostile countries.*

H.R. Rep. No. 485, 65th Cong., 2d Sess. 2-3 (1917) [emphasis added]. *See also 1917 Att'y Gen. Ann. Rep.* 16 (recommending "passage of a law conferring on the President power to regulate . . . departure of all persons, both citizens and aliens, to and from the United States and its possessions during a state of war"); *1918 Att'y Gen. Ann. Rep.* 39-40 (noting that despite the "Secretary of State['s] . . . restrictive powers under section 3(b) of the trading with the enemy act . . . proper regulation was found to be impossible. . . . Appreciating the situation Congress passed an act . . . which empowered the President to exercise control over the departure and entry of all persons . . . ").

[42] President Roosevelt's judgment not to proscribe travel (or indeed living) expenditures in even enemy nations under the TWEA is surely a telling comment on how far we have come in our understanding of the extent to which individual liberties in a free so-

Nor was there any attempt until this case to rely on the TWEA to deter travel to other nations, many of which were, and all of which could have been, subject to embargo. This failure to invoke the TWEA is particularly significant given the congressional opposition to various judicial decisions upholding the right to travel, and extensive hearings held in an attempt to grant a broad travel control authority to the executive.[44]

In light of extremely widespread and notorious travel in violation of various State Department area bans, including the Cuban ban upheld in *Zemel*, the failure to prosecute such travelers for their travel expenditures under the TWEA is powerfully indicative of the joint judgment of the executive and Congress that travel (including the expenditures without which travel is impossible) was not a crime.[45] American journalists openly traveled to China in the face of a TWEA embargo similar to the general embargo on Cuba;[46] literally hundreds of

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ciety may be abridged for the interests of the state. Nor can the form of President Roosevelt's judgment—phrased as a general license for travel expenditures of $6,000 yearly—be considered a discretionary determination to *permit* expenditures which could have been proscribed. As discussed *infra* at 47-48, given the structure in which TWEA regulations have arbitrarily been cast, as a general prohibition with various exceptions, there was no good way to make explicit the TWEA's failure to cover personal travel expenditures except by a statement of non-coverage.

[44] *See infra* n. 47.

[45] *See generally Kent* v. *Dulles*, 357 U.S. at 127-28 (failure to exercise claimed power when occasion called for its exercise indicative of lack of authority). Although widespread enforcement is not indispensable to finding implied congressional approval of a power where it has been openly asserted and where there have not been "frequent occasions" for its use, *Haig* v. *Agee*, 453 U.S. at 302, the power has not been openly asserted here in the manner canvassed in *Agee*, and the occasions for its use have numbered in the hundreds if not thousands. *See infra* pp. 26-27.

[46] The report of the City Bar describes a trip by three American newsmen who traveled to China for *Look* magazine, which was the

Americans openly traveled to and spent money in Cuba despite geographic and trade restrictions imposed after the missile crisis;[47] and numerous opponents of the Vietnam war—including Harrison Salisbury, Ramsey Clark, Jane Fonda, and others less well known—traveled openly and without a single prosecution under the TWEA to

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subject of extensive press coverage. "Shortly after three United States newsmen traveled to Communist China in violation of the ban on such travel, the Department of State announced that it would refer the cases to the Treasury Department for possible prosecution under the Trading With the Enemy Act. *Plans for such prosecution were later abandoned, apparently for the reason, which the Committee believes to be sound, that successful prosecution was not possible under the provisions of that Act. The Act was never intended to be used as a device for the regulation of travel or passports.*" *Freedom to Travel, supra*, at 72 (footnotes omitted) [emphasis added].

[47] *See, e.g., United States* v. *Laub, supra*, 385 U.S. at 485 (over 600 individuals who traveled to Cuba despite the area restrictions upheld in *Zemel* v. *Rusk, supra*). Similarly, in early 1970, it was widely reported that 687 Americans went to Cuba to engage in eight weeks of cutting sugar cane without any attempt of prosecution by the Government. *N. Y. Times*, Apr. 29, 1970, at 3, col. 2; *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1144 n.48 (1971). In testimony before a Subcommittee on the Judiciary, one member of the Laub delegation testified that he spent over $100 in Cuba on his trip and stated that the Cuban government told the group that "we could change our money from dollars to pesos and at the end of the trip any unused pesos could be changed back to dollars on a 1 to 1 basis." *Violation of Foreign Travel Restrictions: Hearing Before Subcomm. No. 1 of the Comm. on the Judiciary, House of Representatives*, 85th Cong., 1st Sess. 35 (1963). Indeed, it was reported to a congressional committee that while purchase of souvenirs incident to travel was purportedly prohibited under the Cuban Assets Control Regulations, no American has ever been actually prosecuted, although "senators, congressmen, congressional aides, and hundreds of others" had violated this rule. *United States-Cuba Trade Promotion: Hearing Before the Subcomm. on Int'l Trade and Com. of the Comm. on Int'l Relations, House of Representatives*, 94th Cong., 2d Sess. 10 (1976). So far as we have been able to ascertain, no one engaging in transactions in connection with either personal or business travel to Cuba was ever prosecuted or even threatened with prosecution under the TWEA.

Hanoi, notwithstanding a general trade embargo[45] and widespread criticism from the executive, Congress, and the press.[46]

Indeed, government instructions included on every passport at this period expressly advised that travel to Cuba, North Korea, and North Vietnam was lawful. Moreover, although passports did contain Treasury Department warnings (on the page providing "General Information") against the "unlicensed purchase or importation of merchandise" from those countries, there was no warning that personal travel expenditures—which encompass payments for transportation, lodging and board—fell under the warnings. The implication could not have been plainer to all passport holders—including, presumably, all Senators and Congressmen—that travel expenditures *were* lawful.[47]

The freedom of such travel and travel expenditures from proscription under the TWEA was implicitly recognized by this Court in *United States* v. *Laub, supra*, which

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[45] *See* 31 C.F.R. Part 500 (1968).

[46] *See, e.g., N.Y. Times*, July 28, 1972, at 3, col. 5; *id.*, Aug. 15, 1972, at 1, col. 6; *id.*, Aug. 24, 1972, at 9 col. 1; 118 Cong. Rec. 31423-26, 32320-24, 32593-95, and 33186-98 (1972). A House Committee studying the matter summarized: "a substantial number of United States citizens have traveled abroad to hostile areas [such as North Vietnam]" without ever being prosecuted. H.R. Rep. No. 248, 93d Cong., 1st Sess. 2 (1973). The report was extremely critical of the travel, but did not even suggest that it could be prosecuted for violating the embargo.

At least two bills reported out of committee during this period would have authorized sanctions for violation of restrictions on travel to countries engaged in armed conflict with the United States, such as Vietnam. *See* H.R. 16742, debated, 118 Cong. Rec. 33197 (1972); H.R. Rep. No. 248, 93d Cong., 1st Sess. 2 (1973). These bills would have been unnecessary had the TWEA already authorized such sanctions.

[47] The sample passport is included in the *Hearings Regarding H.R. 16742: Restraints on Travel to Hostile Areas, House Comm. on Int. Sec.*, 92nd Cong., 2d Sess. 7566 (1972), and reproduced, *infra*, as Appendix B.

observed that "the State Department ha[s] consistently taken the position that there was *no statute* which imposed or authorized" criminal sanctions for violations of geographical travel restrictions. 385 U.S. at 485 (1967) [emphasis added]. Even after *Laub* held that § 215(b) of the Immigration and Nationality Act, 8 U.S.C. § 1185, did not provide for criminal sanctions for violations of area restrictions, the executive still placed no reliance on the TWEA. Instead, it turned to administrative sanctions enforced by the State Department. 31 Fed. Reg. 13544, *codified as* 22 C.F.R. § 51.74 (1967). This practice was declared invalid in *Lynd* v. *Rusk*, 389 F.2d 940, 946-47 (D.C. Cir. 1967). Even then, however, the government did not turn to the TWEA to provide the criminal sanctions for travel to embargoed nations like Cuba and North Vietnam.

Legislative measures were introduced in every Congress from 1958 until 1976 to provide for criminal sanctions for violations of area restrictions.[51] Many of these bills were introduced at the request of the executive,[52] and numerous congressional hearings were held on these bills.[53]

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[51] Note, *Area Restrictions and the Right to Travel Abroad*, 8 U. C. Davis L. Rev. 401, 426-427 (1975).

[52] In 1958, President Eisenhower asked Congress "for clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives. . . ." H.R. Doc. No. 417, 85th Cong., 2d Sess. 1-2 (1958). Eisenhower thus believed that the TWEA gave him no such authority. Ehrlich, *Passports*, 19 Stan. L. Rev. 129, 147 n.81-84 (1966).

[53] *Hearings on Restraints on Travel to Hostile Areas, H.R. 1594 (Clean Bill H.R. Rep. No. 8023), H.R. 278, H.R. 297, H.R. 2691, H.R. 3999, H.R. 6047 Before the House Comm. on Internal Security*, 93d Cong., 1st Sess. (1973); *To Restrict Travel of U.S. Citizens to Countries in Armed Conflict with the United States, Hearings Before the Senate Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Hearings Regarding H.R. 16742: Restraints on Travel to Hostile*

In not one of these hearings did any administration witness ever suggest that the TWEA authorized criminal sanctions for violation of area restrictions or even mention the TWEA as a possible source of criminal sanctions. Instead, every administration witness continued to claim that "there is *no statute* with which a person can be effectively prevented from traveling to an unauthorized area." *Hearings Regarding H.R. 16742: Restraints on Travel to Hostile Areas Before the Committee on Internal Security, House of Representatives*, 92d Cong., 2d Sess. 7561 (1972) (statement of W. Olson [emphasis added]). *See also* H.R. Rep. No. 248, 93d Cong., 1st Sess. 18 (1973) (Department of Justice view is that "area restrictions today are ineffective since the Secretary has no realistic means of enforcing them").

Thus, even with respect to travel to countries, such as North Vietnam, which were engaged in armed conflict with the United States and embargoed, State and Justice Department witnesses from various administrations consistently concluded that no sanctions of any sort existed. If the executive believed that personal travel for which money was spent could be controlled under the TWEA, surely that claim would have been made during the two decades of congressional attention to this problem. Given the strong desire, born of national security concerns, of every administration from 1957 through 1976 to enforce area restrictions effectively, the fact that the TWEA was

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Areas, Before the Comm. on Internal Security, 92d Cong., 2d Sess. (1972); *Proposed Travel Controls, Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Sen. Comm. on the Judiciary*, 89th Cong., 2d Sess (1966); *Violation of Foreign Travel Restrictions, Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary*, 85th Cong., 1st Sess. (1963); *Passport Legislation, Hearing Before the Senate Comm. on Foreign Relations*, 86th Cong., 1st Sess. 17-18, 71-72 (1959); *Hearing on the Right to Travel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. Part II, 190-195 (1957).

never relied upon or even mentioned by the executive (or anyone else) as providing the authority to prohibit travel or travel transactions compels rejection of any claim that the TWEA can now be invoked to justify that power.

In light of these facts, it is hardly surprising that none of the voluminous commentary appearing between 1940 and 1980 addressing geographic travel restrictions and the sanctions available for violation of those restrictions concluded that the TWEA provided an alternative authority for the administration to prohibit travel or travel transactions already subject to area controls.[54] To the contrary, the scholarly community, like Congress and the statements of the executive to Congress, all agreed that after *Laub* any geographic restrictions on travel were enforceable *only* through the limited deterrent effect of passport invalidations.

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[54] In a comprehensive article in 1940, a distinguished scholar, Professor David Riesman, Jr., canvassed all possible sources of executive authority to restrict travel as well as applications of that authority, and although he was plainly familiar with the Act, gave no indication that the TWEA had any relevance to the question at all. *See* Riesman, *Legislative Restrictions on Foreign Enlistment and Travel*, 40 Colum. L. Rev. 793 (1940). The Riesman article describes specific congressional attention to the problem and provision for it in specific statutes or resolutions which did *not* include the TWEA. *See also* Note, *The Right to Travel Abroad*, 42 Fordham L. Rev. 838 (1974); Rauh & Pollitt, *Restrictions on the Right to Travel*, 13 Case W. Res. L. Rev. 1 (1961); Note, *Area Restrictions and the Right to Travel Abroad*, 8 U. C. Davis L. Rev. 401 (1975); Note, *Constitutional Law; Right to Travel versus Power to Conduct Foreign Affairs: Area Restrictions on Passports: Zemel* v. *Rusk*, 50 Cornell L.Q. 262 (1964). Comment, *Executive Restrictions on Travel: The Passport Cases*, 5 Hous. L. Rev. 499 (1968); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1141-1153 (1972) (discussing area restrictions); Velvel, *Geographical Restrictions on Travel: The Real World and the First Amendment*, 15 U. Kan. L. Rev. 35 (1966); Erhlich, *Passports*, 19 Stan. L. Rev. 129 (1966); Note, *Travel and the First Amendment: Zemel* v. *Rusk*, 13 U.C.L.A. L. Rev. 470 (1966).

C. The express congressional recognition during World War I that the TWEA did not authorize prohibition of personal travel transactions and the total absence for a half century after its passage of any claim that it could be so used,[15] are fatal to finding congressional authority for the challenged regulations.

An implied congressional authorization such as this Court found in *Zemel*, 381 U.S. at 7-12, and *Agee*, 453 U.S. at 293-303, is totally lacking. There, this court found that the legislative history of the original statute (the Passport Act) did not bar the claimed power, and that Congress, in enacting subsequent travel legislation in 1952, impliedly approved the executive's open assertion and application of that power. Here, by contrast, the TWEA was never intended to control and has never been used against travel expenditures, despite literally hundreds of opportunities to do so.[16]

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[15] The government has not provided any evidence that the executive publicly asserted a power to control travel expenditures in a way likely to have come to the attention of Congress. The materials the government submitted to the court of appeals after oral argument on which it now relies, Br. 21 n.22, to show implied congressional approval (correspondence with businessmen and lawyers concerning business travel expenditures and a note in the State Department's Foreign Affairs Manual) were not presented to Congress, and differ from the showing of longstanding and openly asserted authority relied upon in *Zemel* and *Agee*. Moreover, this Court's reminder in *INS* v. *Chadha*, —— U.S. ——, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), that Article I authority must be exercised in conformity with constitutionally mandated procedures renders the government's attempt to wring legislative authorization from several equivocal statements by executive officials singularly unpersuasive.

[16] *See Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) (congressional acceptance not a relevant criterion to judge the validity of restrictions promulgated under IEEPA in light of legislative intent which contradicts the use of the claimed power).

III.

The Regulations Are Not Authorized by Public Law 95-223 Because the Executive Failed to Comply With IEEPA and the Authority to Embargo Travel or Travel-Related Transactions With Cuba Was Not "Being Exercised" on July 1, 1977.

Petitioners concede that, in promulgating the April 1982 regulations, the President did not comply with IEEPA, and that those regulations were not predicated upon a national emergency. Petitioners construe the grandfather clause in isolation from the broad remedial purposes of Public Law 95-223, and in disregard of its language, purpose and legislative history.

A. *The Legislative Purpose, History and Language of IEEPA and the Grandfather Clause Overwhelmingly Support the Decision of the Court of Appeals.*

1. *Legislative Purpose.* Public Law 95-223, which in 1977 amended the TWEA and enacted IEEPA, had a single paramount purpose: to terminate the executive's discretionary, unreviewable, and, in the eyes of the key participants in the legislative process, constitutionally suspect use of TWEA § 5(b) emergency authorities as a flexible tool of non-emergency foreign policy. The "dominant movement and fundamental purpose[]" of the Act, to borrow petitioners' phrase,[57] was thus to slam the door on the very "background" of flexible executive "emergency" action to which petitioners appeal in an attempt to obscure the overwhelming legislative history supporting the decision below. Petitioners' strained reading of this remedial legislation is based on a supposed standard created by the very wrongful conduct Congress sought to stop.

In 1973, during the climax of Watergate and the denouement of Vietnam, Congress began the arduous legisla-

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[57] *See* Br. 38.

tive process of reallocating authority in foreign policy-making—particularly emergency and wartime policy—from the executive to the legislative branch. The Senate Special Committee on the Termination of the National Emergency concluded that "[f]or 40 years, freedoms and governmental procedures guaranteed by the Constitution have, in varying degrees, been abridged by laws brought into force by states of national emergency." S. Rep. No. 549, 93rd Cong., 1st Sess. 1 (1973).

The most fertile statutory sources for the perpetual "emergency" regulations during those forty years were the wide-ranging authorities over trade and finance, both domestic and international, conferred by TWEA § 5(b).[18] Invoking that provision, successive presidents had promulgated fully discretionary and unreviewable economic controls on the basis of unexpired (and also unreviewable) declarations of "national emergency" that were decades old and wholly unrelated to the problems addressed by those controls.[19]

Congress' initial remedial step, the National Emergencies Act (NEA) of 1976, 50 U.S.C. §§ 1601 *et seq.*, terminated emergency authority under declarations then in effect, and limited the President's future declarations of national emergency and exercise of emergency authorities. The Senate Special Committee report on the NEA re-

[18] That provision was initially intended to authorize embargoes only during times of actual war. Act of Oct. 6, 1917, ch. 106, 40 Stat. 411. Under the exigencies of the Great Depression, Congress ratified President Roosevelt's March 6, 1933 bank holiday Proclamation, and amended TWEA § 5(b) to authorize such economic controls "[d]uring time of war or during any other period of national emergency declared by the President." Act of Mar. 9, 1933, ch. 1, 48 Stat. 1, 12 U.S.C. § 95a, 50 U.S.C. App. § 5.

[19] The Cuban regulations extant on July 1, 1977 were based on President Truman's 1950 declaration of national emergency in connection with the Korean War. *See Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 17 (Statement of Prof. A. Lowenfeld).

iterated that "protections and procedures guaranteed by the Constitution have, in varying degrees, been abridged by Executive directives whose legality rests on the continued existence of Presidentially proclaimed states of emergency." S. Rep. No. 922, 94th Cong., 2d Sess. 1 (1976).[40] In view of these findings, the NEA was designed to "ensure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency. . . ." *Id.* at 18.

TWEA § 5(b) authorities were exempted from the NEA reform pending further congressional study. At the 1977 Subcommittee Hearings on TWEA, however, Representative Bingham, the principal legislative sponsor of Public Law 95-223, emphasized that this exclusion "was not meant to exempt forever the Trading With The Enemy Act from the intent of Congress that emergency powers should not be available for routine application."[41]

From the earliest stages of the Subcommittee Hearings, the dominant theme was the executive's wrongful use of § 5(b) emergency powers as a flexible instrument of non-emergency foreign policy. Every expert witness urged remedial legislation to stop such use of § 5(b) authorities.[42] The subcommittee discussed the possibility of recasting

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[40] Noting that "broad economic measures" were often passed "with virtually no consideration of a law's effect on civil liberties," the Senate Special Committee stated that "the time has come to reverse the pernicious habits of the past." *Id.* at 13.

[41] *Emergency Controls on International Economic Transactions: Hearings before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations*, 95th Cong., 1st Sess. 111 (1977) (hereinafter "Subcommittee Hearings").

[42] *See, e.g., Subcommittee Hearings, supra*, 13 (statement of Prof. A. Lowenfeld) ("no practical constraint limiting actions taken under emergency authority to measures related to the emergency"); *id.* at 39 (statement of Prof. S. Metzger) (§ 5(b) "has been used *generally* for purposes related to the national security and the conduct of the foreign relations of the United States." [emphasis added]; *id.* at 30 (statement of Prof. H.G. Maier) ("Sec. 5(b)'s

§ 5(b) as standard nonemergency legislation. Administration spokesmen, however, questioned the legality of exercising § 5(b) powers in the absence of a true national emergency. Julius Katz, Assistant Secretary of State, testified that "there is a substantial legal question as to whether action not related to declared national *emergencies* or to some other *equivalent* evidence of overriding national interest would find . . . support in the courts." *Id.* at 100 [emphasis added]. The leading administration spokesman at the hearings, C. Fred Bergsten, Assistant Secretary of Treasury, raised the possibility that the exercise of § 5(b) powers in the absence of a true "emergency" was constitutionally infirm. *Id.* at 104. He added:

> [W]hile the flexibility afforded by section 5(b) is both necessary and desirable in emergency powers, such flexibility would be inappropriate to standard, nonemergency legislation.
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> . . . [T]his Administration strongly believes that the [§ 5(b)] powers should only be used on a truly emergency basis.

Id. at 108-9.

Summarizing Mr. Katz' and Mr. Bergsten's view, Congressman Bingham stated, "As I understand the testimony, both of you indicate that it is not possible to do any of the things that we now do on the theory that emergencies exist, under some other theory by appropriate legislation." *Id.* at 118.[83] The notion of recasting § 5(b) powers into nonemergency legislation was dropped.

The subcommittee and the administration also agreed that a true state of emergency did not exist either generally

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effect is no longer confined to 'emergency situations'. . . ."); *id.* at 83 (statement of P. Weiss) ("The [TWEA] is a prime example of the unchecked proliferation of Presidential power for purposes totally unforeseen by the creators of that power."). All of these expert witnesses were quoted in the House Committee report. H.R. Rep. 459, 95th Cong., 1st Sess. 7-9 (1977).

[83] Mr. Katz agreed with Representative Bingham's summary, with two exceptions not pertinent to the Cuban situation. *Id.*

or with respect to Cuba. Representative Bingham expresed vigorous agreement with Mr. Bergsten's statement to the subcommittee:

> Mr. Bergsten, I really think that your statement suggests that we are playing fast and loose with the Constitution. We are relying on an emergency which does not exist to justify a taking, or actions taken by the administration.
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> . . . [T]he executive branch wants to be free to continue to act with an enormous degree of discretion on the basis that an emergency exists, although by no commonsense application of the term could the situation be called an emergency. *Id.* at 112-13.

Representative Bingham made it clear on at least three occasions that relations between Cuba and the United States were not in a state of emergency.[44] Administration spokesmen concurred.[45]

This express evidence of legislative purpose, supported by the detailed legislative history set forth below, rebuts the petitioners' contention that Congress intended to give the executive broad, expanding and flexible authorities under the grandfather clause to act in a non-emergency situation. Congress did indeed provide the executive with flexible authority to expand a regulatory program, but only in the event of a true emergency in which IEEPA was properly invoked and complied with. It was in the context of such a genuine, declared national emergency that the Court upheld such flexibility in the Iranian situation. *Dames & Moore* v. *Regan*, 453 U.S. 654, 662 (1981). Petitioners' reliance on executive "flexibility" assumes the relevance of the very foundation on which *Dames & Moore* and the IEEPA authorities rest—that is, the existence of a genuine emergency.

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[44] *See id.* at 110, 117, 119.

[45] *See, e.g., id.* at 193 (remarks of L. Santos).

In light of the dominant purpose of preventing the executive from issuing new emergency regulations absent a true emergency, Congress permitted the President to continue old regulations on the basis of an annual declaration that such continuation was in the "national interest," rather than an annual declaration of national emergency. Congress desired neither to "sanction the phony character of the emergency" that ostensibly underlay the Cuban regulations, *id.* at 210 (remark of Rep. Findley), nor to create an incentive for the executive to perpetuate the "fiction[]" that regulations issued under § 5(b) were based on a true emergency. *Id.* at 136 (remark of Rep. Bingham). Petitioners erroneously consider the "national interest" standard for invoking the grandfather clause to be a "substitute for new declarations of national emergency," Br. 29, with no effect on the degree of flexibility to which the executive is entitled. In fact, Congress chose the lower standard in recognition that there was no extant emergency to justify the flexible expansion of existing regulations.

Congress had two specific purposes in allowing the President to continue existing regulations.[**] First, the legislators were concerned that the President should not be forced to give up diplomatic bargaining chips by ending existing controls without winning concessions from those nations subject to those controls. Professor Lowenfeld argued that the Cuban trade regulations "should not be terminated without some kind of quid pro quo" or "without any understanding." *Id.* at 10. Mr. Bergsten concurred in the view that the President should be able to continue the "status quo" only so as not to damage his "negotiating position." *Id.* at 113; *see also id.* at 103 (statement of C.

[**] Several subcommittee members initially opposed grandfathering of any § 5(b) regulations. *Id.* at 167 (remarks of Rep. Cavanaugh); *id.* at 210 (remarks of Rep. Findley). *Id.* at 119 (colloquy between Rep. Bingham and Mr. Bergsten). The two key strictures contained in the grandfather clause—permitting the preservation only of specific existing regulations and only on a "national interest" standard—reflect the narrow *compromise* reached between the subcommittee and the administration.

Fred Bergsten) (unilateral termination of embargoes would undermine bargaining position). Second, Congress did not want to release frozen assets against which American claimants might eventually recover. *Id.* at 103-4 ("Loss of control of these assets would deprive American claimants against these countries of the security afforded for their private claims by this collateral.")

Neither of these purposes underlying the grandfather clause supports the petitioners' desired expansion of the specific regulations in effect on July 1, 1977. Congress was reluctant to wipe the slate clean by compelling the President to relinquish bargaining leverage without a diplomatic *quid pro quo*, but did not intend the grandfather clause to serve as the President's *carte blanche* to *augment* his bargaining power by issuing new emergency regulations absent a true emergency. Nor did Congress indicate any intent to permit the executive to create *new* pools of frozen assets by the continued "phony" use of emergency powers. *Id.* at 210 (remark of Rep. Findley).[47]

These clearly articulated legislative purposes—underlying both Public Law 95-223 as a whole and the grandfather clause—are antipodal to petitioner's call for executive "flexibility".[48] That call—the echo of discredited ex-

[47] Congress provided the executive with flexible authority to increase his bargaining leverage by issuing new regulations, but only if the executive complied with IEEPA.

[48] The general purposes of Public Law 95-223 and the specific purposes of the grandfather clause thus reinforce the well-established canon that grandfather or savings clauses require narrow, strict interpretation, *e.g. Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Gregg Cartage & Storage Co.* v. *United States*, 316 U.S. 74, 83 (1942), as do both criminal statutes, *e.g., United States* v. *Laub*, 385 U.S. 475, 480 (1967), and statutes affecting basic liberties. *E.g., NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 504-507 (1979); *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958). Contrary to petitioners' contention, there is nothing anomalous about allowing the executive to continue, but not to expand, existing regulations. The central purpose of grandfather clauses is to *phase out* the offending conduct.

ecutive abuses of emergency authorities—cannot drown out the overwhelming chorus of legislative and executive voices explicitly limiting the grandfathered regulations to the specific ones in effect on July 1, 1977.

2. *Legislative History.* The court below was not speaking hyperbolically when it stated that "throughout the committee hearings and the House and Senate reports, *nearly every time* a legislator referred to the 'savings clause' and to the exercise of the TWEA 'authorities,' he spoke of specific, existing *'uses'* of those authorities." Pet. 7a [first emphasis supplied].[9]

Congressman Bingham observed:

> [I]f the President has not up to now used some authority that he has under section 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to give him authority to expand what has already been done. It is really going beyond grandfathering.
>
> It seems to me that grandfathering applies to what has been done to date. . . .

Subcommittee Hearings, supra, at 167. Similar statements in the legislative materials are legion.[10]

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[9] The Eleventh Circuit agreed fully with the First Circuit's reasoning. *United States* v. *Frade,* 709 F.2d 1387 (11th Cir. 1983).

[10] *E.g., id.* at 189 (statement of Rep. Bingham) ("it was the purpose of [the grandfather clause] to grandfather in *existing uses* of section 5(b)"); *id.* at 168 (statement of Rep. Cavanaugh) ("where the powers of 5(b) are *currently operative*"); *id.* ("the current *employments* [of controls]"); *id.* at 182 (statement of Rep. Cavanaugh) ("ongoing *uses* of 5(b)"); *id.* at 147 (statement of R. Roger Majak, Staff Director of Subcommittee on International Economic Policy & Trade) ("There is a clear need to grandfather or deal in some special way with *existing* uses of section 5(b) authorities. . . ."); *Revision of Trading With the Enemy Act: Markup Before the House Committee on International Relations,* 95th Cong., 1st Sess. 9 (1977) (hereinafter, "Markup")

Rarely do legislators from both parties speak with such unanimity and clarity on the meaning of a statutory provision.[71] More rarely still does such explicit Congressional bipartisan interpretation of a particular provision stand in such complete harmony with the express purposes of the overall statutory scheme. The only construction of the grandfather provision consistent with the legislative purposes discussed above is that in fact enunciated repeatedly and in the clearest terms by the legislators: without properly declaring a legitimate national emergency, the executive should be permitted to carry forward only the specific existing regulations issued under § 5(b) and could not make new use of emergency authorities.[72]

3. *Language.* That these legislators meant exactly what they said is conclusively shown by the subcommittee's al-

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(statement of Rep. Bingham on behalf of the Subcommittee) *id.* at 9 ("So the subcommittee settled on a *limited* grandfather of *existing uses* of international economic emergency authorities."); *id.* at 7 ("*future actions* and policies in this area must be subject to [the IEEPA] procedures"); *id.* at 10 (statement of Representative Whalen) ("[W]e have stipulated Presidential discretion *to continue any controls currently in effect*"); H.R. Rep. No. 459, 95th Cong., 1st Sess. 2 (1977) ("[*C*]*urrent uses* of those authorities . . . may continue."); *id.* at 11 ("[E]xercise of emergency powers under section 5(b) which are currently in progress should generally be exempted.") [all emphasis added].

[71] As the court below stated:

> "[A] reading of the history of IEEPA and the TWEA amendments suggests, *even more strongly than a few quotations can indicate*, that Congress intended IEEPA, not the old TWEA, to apply to particular restrictions, such as Cuban travel, not in effect in July 1977." Pet. 11a [emphasis added].

[72] The government's specious counter-argument—that Congress sought to remedy the President's unconstitutional use of emergency powers by granting him the unchecked discretion not only to expand those abuses generally, but also to expand them into the particular, constitutionally sensitive area of the right to travel—is too dubious a ground for disregarding or warping the explicit references to existing, specific "uses," "actions," "controls" and "regulations" that pervade the legislative discourse.

teration of the grandfather clause during the hearings. An early draft of the clause provided:

> (1) any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of enactment of this Act as a result of a national emergency declared by the President before such date of enactment, may continue to to be exercised with respect to such set of circumstances; and
>
> (2) *any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances. . . .*

Amendments to the Trading With the Enemy Act: Subcommittee Working Draft of June 8, 1977, 95th Cong., 1st Sess. § 101(b) [emphasis added]. Subcommittee Staff Director Majak explained that under the second provision,

> with respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those *particular* authorities that he is now using, but any others which are conferred by section 5(b).
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> . . . I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the *particular* authorities themselves and their *usage.*

Subcommittee Hearings, supra, at 167 [emphasis added]. Congressman Bingham responded:

> I have a serious question about that. It seems to me that if the President has not up to now used *some* authority that he has under section 5(b) *in connection with those cases where 5(b) has been applied,* I don't

> know why it should be necessary to give him authority to *expand* what has already been done. It is really going beyond grandfathering.
>
> It seems to me that grandfathering applies to what has been done to date, and that should be ample authority.

Id. [emphasis added]. The subsequent alteration of the provision into its present form represented a double narrowing of the authorities preserved. First, the phrase "with respect to a set of circumstances" was changed to "with respect to a country," ensuring that regulations in effect against one country could not be expanded to cover another country. Second, the second provision in the early draft was deleted to ensure that if some specific regulations were in effect against a country, more expansive regulations could not be promulgated against that country. As Congressman Bingham stated, "in connection with those cases where 5(b) has been applied," the President should not be given authority to "expand what has already been done." *Id.*

The plain meaning of Congressman Bingham's words is the only meaning consistent with the explicit statutory purpose of stopping the President from continuing to invoke §5(b) emergency authorities for new regulations for non-emergency foreign policy purposes. Petitioners' contention, Br. 48 n.44, that Congressman Bingham's remarks show "on their face" that he was concerned at most that one broad category of authorities not be used as a predicate for the exercise of a different broad category is simply mistaken. While a subcommittee staff member casually referred to "asset controls" and "currency controls," *id.*, (which appear nowhere as defined categories of authorities in the TWEA statutory scheme[12]), Representative Bingham's was the key legislative voice. The plain

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[12] *See supra Point II.*

meaning of his words cannot be obscured by even the most ingenious formalistic categorizing."[74] He said simply and unequivocally that the President should not be permitted to do any more than had already been done, even with respect to a country already under § 5(b) regulation.

Of course, the clear premise of Congressman Bingham's statement is that not *all* § 5(b) authorities were being exercised with respect to the countries against which *some* § 5(b) authorities were being exercised. Contrary to petitioners' argument, this authoritative statement by the leading legislative spokesman cannot be overridden by the plainly self-serving, and in any event incorrect remarks by a low-level Treasury official that "all that [§ 5(b)] powers conferred are [already] exercised." *Id.* at 188 (Leonard Santos, attorney adviser, Dep't of Treasury).[75] No one else during the legislative process suggested that all § 5(b) authorities were already being exercised against all countries or against any one country.[76] Indeed, the contrary view was repeatedly expressed during the hearings in the presence of Santos and without his objecton. *See, e.g., id.* at 167 (statement of Rep. Bingham); *id.* at 108 (statement of Mr. Bergsten) (embargo under Foreign Assets Control Regulations, which "parallel" Cuban regulations, does not cover "travel"). In fact, Mr. Santos himself later stated that the grandfather clause did not

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[74] In any event, as we demonstrate below, the court of appeals correctly concluded that if categorical lines are to be drawn, travel-related transactions form a distinct category of § 5(b) authorities. *See infra* at 47-54.

[75] Petitioners argue that Santos's remark shows that the second provision of the early drafts of the grandfather clause was surplusage and that its deletion therefore does not support the decision below. *See* Br. 48-49.

[76] Even petitioners—who, before falling back to less radical positions, make the extreme argument that all *property* transactions were being regulated with respect to Cuba—do not go so far as to contend that *all* § 5(b) authorities were being exercised with respect to Cuba.

preserve the use of emergency powers "with respect to a new country, *or* with respect to a situation that did not exist at the time this law goes into effect." *Id.* at 212 [emphasis added]. The second clause of this disjunctive would itself have been surplusage had Santos' earlier claim—*i.e.*, that all § 5(b) powers were being exercised—been true. Moreover, as the court below detailed, the administration spokesmen for the bill—including Santos himself—repeatedly and overwhelmingly spoke of the authorities preserved in the same terms used by the legislators, that is, in terms of preserving specific existing regulations and prohibiting any new action under § 5(b) authorities. *Id.* at 211 (remarks of Santos); *see also* Pet. 8a-9a (citing five such remarks by Santos. Congressman Cavanaugh questioned Mr. Bergsten of the Treasury Department about the meaning of the grandfather clause:

> Mr. Cavanaugh: . . . First of all, Mr. Bergsten, would it be your understanding that section 101 [the grandfather clause] would *strictly limit* and *restrict* the grandfathering of powers currently being exercised under 5(b) to those *specific* uses of the authorities granted in 5(b) being employed as of June 1, 1977.
>
> Mr. Bergsten: Yes, sir.
>
> Mr. Cavanaugh: And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977."
>
> Mr. Bergsten: That is right.

Markup, supra, at 21 [emphasis added].

Petitioners contend that a few references in the legislative history to the existing trade or finance "embargo" with Cuba and other countries somehow extinguish the per-

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" The cutoff date was later advanced to July 1, 1977, for reasons not pertinent here. *See* H.R. Rep. 459, 95th Cong., 1st Sess. 11 (1977).

vasive references—"nearly every time a legislator" spoke—to "specific, existing *'uses'* of those authorities." Pet. 7a [court's emphasis]. No one denies that there was a trade embargo against Cuba on July 1, 1977 or that the existing embargo was preserved by the grandfather clause. By the same token, it is unarguable that there was no embargo on travel or travel-related transactions with Cuba on that date.[18] The references in the legislative history to existing "embargoes" only strengthen our contention that, because there was no exercise of the authority to regulate or embargo travel-related transactions on July 1, 1977, such authority was not preserved by the grandfather clause.[19]

Petitioners, seeking to avoid this uncomfortable conclusion, argue that "Congress was aware that embargoes are adjusted over time to meet changing foreign policy needs." Br. 45. It is true that Congress was aware that Presidents before 1977 had resorted to new emergency regulations to conduct specific trade and finance embargoes as a flexible tool of routine foreign policy. That practice, however, is precisely what Congress decided to stop by the 1977 enactment of IEEPA and amendment of TWEA.

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[18] Mr. Bergsten noted explicitly in a prepared statement that the Foreign Assets Control Regulations, which "parallel" the Cuban Assets Control Regulations, embargoed "current transactions" but not "travel." *Subcommittee Hearings*, *supra* at 108. This considered, prepared description of the limits of the existing embargo represented the view of the entire executive branch. *Id.* at 110 (statement of Mr. Bergsten).

[19] The House Report explicitly states that a general license—such as the 1977 Carter authorization of travel-related transactions to Cuba—constitutes a *lifting* of a pre-existing "embargo." H.R. Rep. 459, *supra* at 6; see *infra* at 48.

Moreover, the language of the grandfather clause does not bear petitioners' reading. If Congress had intended to grandfather entire flexible systems or programs of controls, rather than specific exercises of authority, it would hardly have done so by grandfathering the particular authorities "being exercised."

B. *Petitioners' Assorted Theories Are Not Only Contradicted by the Legislative History and Purpose, But Would Afford the President Limitless Discretion to Impose New Emergency Regulations Against All Countries Absent a True Emergency, the Very Practice Congress Sought to Stop.*

Each of petitioners' alternative constructions of the grandfather clause is either contradicted by the explicit legislative history and purposes or analytically incoherent —or both.

1. Petitioners' first theory is that the President may exercise all § 5(b) authorities with respect to a country against which he was exercising any § 5(b) authority on July 1, 1977. This theory is refuted by the abundant legislative history making clear that if the President were exercising only *"some* [§5(b)] authority" *in a particular case,* he should not be given "authority to *expand* what has already been done." *Subcommittee Hearings, supra* at 167 [emphasis added].[20]

The practical and conceptual incongruity of petitioners' initial theory is made plain by the fact that on July 1, 1977, *some* § 5(b) authorities were being exercised with respect to *every* country in the world. For example, the Treasury's Transaction Control Regulations, promulgated under § 5(b), on that date barred "transaction[s] involv[ing] the shipment from *any foreign country* of any [strategic] merchandise" to any of sixteen listed countries.[21] 31 C.F.R.

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[20] As we have shown, more extensive grandfathering would have subverted Congress' paramount purpose: to stop the issuance of new emergency regulations to implement non-emergency foreign policies.

[21] There was a general license authorising shipments of strategic goods from Canada, West Germany, France, the United Kingdom, and other countries. 31 C.F.R. § 505.31(a)(2). Under petitioners' "general license theory", *see infra* at 47-49, and "three-fold category theory," *see infra* at 49-51, the grandfather clause permits the President to now exercise § 5(b) emergency authorities to impose a total trade and travel embargo against our NATO allies, even in the absence of a declared national emergency.

§ 505.10 (1977 [emphasis added]. Petitioners' theory would thus render pointless Congress' enormous effort and clear intent in enacting IEEPA and amending the TWEA, for the President's power to exercise *any* § 5(b) authority with respect to *any* foreign country absent a true national emergency would be preserved.

2. Petitioners' second theory is that President Carter's 1977 refusal to exercise § 5(b) authority to embargo travel to Cuba was in fact an exercise of authority taking the form of a general license to a broader prohibition on certain economic transactions. The court below correctly refused to countenance such a transparent subordination of substance to form.

The fact is that on July 1, 1977, a United States citizen could exercise his constitutional right to travel to Cuba and make the necessary travel expenditures without permission from the United States government. No regulations required him to keep a record of or, upon return, to make a report concerning such expenditures. Travel-related expenditures with Cuba were in every substantive sense unregulated on July 1, 1977.

Congress could not have contemplated that this substantive *non-exercise* of regulatory authority could be transformed into the "exercise" of authority by the wholly contingent choices of the draftsmen at the Office of Foreign Asset Controls (OFAC). That is, OFAC could have restricted some transactions while permitting others in one of two ways: (1) by simply restricting the former, or (2) by restricting all activities but granting a so-called general license for the latter. Surely Congress did not intend that the outcome of a grave reallocation of power between the executive and legislative branches be determined by such arbitrary drafting decisions.[22]

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[22] This problem is not hypothetical. See the discussion of the China regulations, *infra* at 48-49.

The *reductio ad absurdum* of petitioners' general license theory is that the grandfather clause would have preserved all of the executive's § 5(b) authorities if OFAC had imposed *no* controls, with no effect whatsoever on economic transactions or travel, but had issued a general license for all § 5(b) transactions. Unlike petitioners' *reductio* regarding cigars and cigarettes, Br. 26, ours is more than hypothetical. On July 1, 1977, the Foreign Assets Control Regulations included a so-called general license for "all transactions with China or its nationals. . . ." 31 C.F.R. § 500.546 (1977).[13] That this total non-regulation—whose purpose and effect is no different than if Treasury had simply never issued any transaction regulations with respect to China—should be the predicate for permitting the President to now exercise emergency authorities to impose a total trade, finance, and travel embargo against China absent a true national emergency, is nonsensical.

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[13] The general license included a narrow exception for transactions in strategic merchandise. 31 C.F.R. § 500.546 (1977). The regulations with respect to China thus consisted of a broad prohibition on transactions, an equally broad "general license", and a narrow exception to the general license. The identical substantive result, of course, would have been more rationally achieved by simply prohibiting transactions in strategic merchandise. The case of China thus demonstrates that, contrary to petitioners' contention, the use of a general licensing scheme is neither "necessary" nor "obvious[ly]" rational. Br. 22, n.23. As discussed *supra* at 47-48, the use of a general license depends on the wholly contingent choices of the OFAC regulatory draftsmen.

The conceptual incoherence of petitioners' general license theory is implicitly conceded by petitioners in their consistent failure to include China in their list of countries as to which there was an existing exercise of authority over property transactions on July 1, 1977, *see* Br. 7, 14, 39, 45, notwithstanding the general license for all transactions with China. During the legislative process the legislators and administrators also failed to include China in their references to existing trade embargoes, suggesting that petitioners' conceptual tricks were not in the minds of those who wrote the grandfather clause. *See, e.g.*, *Subcommittee Hearings*, *supra*, at 103, 108 (Mr. Bergsten); *id.* at 147 (Mr. Majak); 123 Cong. Rec. 38166 (1977) (remarks of Rep. Bingham).

Yet that would be the necessary result if the Court adopts petitioners' general license theory.

3. Petitioners' third theory is that three broad categories of authorities are somehow immanent in the "structure" of § 5(b): (1) authority over currency, bullion and securities; (2) authority over property; and (3) vesting authority. Aside from the fatal conceptual flaws in this scheme,[44] it is, for the same reasons as petitioners' first theory, contradicted by the explicit legislative history and purposes. No reference was made in the legislative process to aggregate categories of grandfathered authorities; rather, Congress made overwhelmingly clear that it wanted to preserve only "what has already been done." *Subcommittee Hearings, supra* at 167 (statement of Rep. Bingham). Moreover, under petitioners' third theory, the grandfather clause would preserve the President's authority to impose a total trade and travel embargo against every

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[44] The complex assortment of overlapping regulatory subject matters and tools in § 5(b) in no way sorts itself inherently into petitioners' three purported categories. The first purported category contains three specific types of property (currency, bullion, securities) which are the subject matter upon which various regulatory tools (investigation, regulation, prohibition)) may be exercised. The second purported category (property), however, *includes* the three specific subject matters that make up the first category, as petitioners recognize. *See* Pet. Br. 20, n. 21. The third purported category (vesting) is not defined by a subject matter of regulation, as are the first two categories, but by a regulatory tool; and it too is included in the regulatory tools ("nullify," "transfer," "compel") of the second category. *See Dames & Moore* v. *Regan*, 453 U.S. 654, 672 n.5 (1981). The three categories are therefore taxonomically inconsistent, and, in any event, conflate into a single subsection of § 5(b). This ramshackle threefold categorization is thus hardly inherent in the "structure" of § 5(b). In any event, when Rep. Cavanaugh asked what the "current uses" of § 5(b) were, the Subcommittee Staff Director answered not by citing the "structure" of § 5(b), but by pointing to "the thick volume compiling the *regulations* . . . which have been issued pursuant to this statute." *Subcommittee Hearings, supra* at 168 [emphasis added]. Those regulations, of course, included an entirely separate section that deregulated travel to Cuba.

and any foreign country, since on July 1, 1977, Treasury regulated *some* property transactions involving every foreign country. 31 C.F.R. § 505.10; *see supra* at 46-47.

Even if Congress had intended to grandfather aggregated categories of § 5(b) authorities, Judge Breyer's conclusion that the authority to impose travel-related regulations and the authority to regulate ordinary commerce and finance are distinct is supported by the consistent practice and pronuoncement of all three branches of government. Pet. 5a-7a. As detailed above, *see supra*, Point II, the very Congress that enacted the TWEA did not understand § 5(b) to empower the executive to curtail travel; and subsequent legislative actions, from 1956 through 1978, indicate the same congressional undertstanding. *See supra*, Points I and II.[35] The executive branch has not brought a single enforcement proceeding—under either TWEA, its predecessor statutes, the Non-Intercourse Acts of the nineteenth century, or its successor, IEEPA—against the thousands of American travelers to embargoed countries. *See supra*, Point II.[36] Indeed, the Carter Administration's deregulation of travel-related transactions with Cuba was guided by broad concerns about personal liberty and not by the traditional parameters of foreign policy toward Cuba, which continued to govern other categories

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[35] Indeed, when regulations of travel was mentioned during the House Subcommittee Hearings on TWEA in 1977, it was always distinguished from regulation of ordinary financial or commercial transactions. *See Subcommittee Hearings, supra* at 4, 15 (Prof. A. Lowenfeld) (distinguishing trade, finance, and travel); *id.* at 108 (C. Fred Bergsten) (travel distinguished from "current transactions"); *id.* at 215 (L. Santos) travel distinguished from exchange of goods).

[36] In his sweeping January 15, 1934 Executive Order issued under the authority of § 5(b), President Roosevelt was careful to ensure the non-regulation of economic transactions for "reasonable traveling and other personal requirements" and to distinguish them from the category of transactions for "commercial or business requirements." Executive Order 6560. *See supra* n.43.

of transactions.[87] Finally, this Court has repeatedly instructed that the Constitution treats delegated authorities that "curtail" or "dilute" the right of travel in a distinctly different way than authorities to regulate ordinary commerce. *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *see infra* Point IV.

The three branches thus speak with a single voice in consistently expressing the categorical distinction between travel and travel-related transactions, on the one hand, and ordinary commercial transactions, on the other. Banning the purchase of cigars *is* categorcially distinct from banning access to the means of travel. Smoking cigars, unlike travel, has yet to receive recognition by all three branches as the exercise of a personal liberty.

4. Finally, petitioners theorize that a broad reading of the grandfather clause is required to avoid a two-track system, under which old regulations would be subject to a national interest standard and new regulations would be subject to the true national emergency standard. Br. 29-30. Petitioners' theory is based on a misreading of IEEPA. Indeed, petitioners themselves concede elsewhere that under IEEPA, once the President declares a national emergency, that declaration suffices for a single, flexible ongoing system of regulation. Br. 28. In short, once IEEPA is invoked, its single track is adequate to carry all regulations with respect to that emergency.[88]

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[87] The Reagan Administration itself acknowledged that the "values served by the right of international travel" require special treatment of travel-related transactions as a category. *See* Pet. Br. in the Court of Appeals 42.

This awareness of the distinctive nature of travel and travel-related transactions is embedded in the very structure of the executive branch. The State Department has jurisdiction over travel curtailment; the Treasury Department oversees ordinary trade regulation; and Treasury has no independent decision-making function as to travel-related transactions. *See supra* n.5.

[88] It is true, of course, that absent a genuine emergency, petitioners are confined to the grandfather clause "track," which permits the President to continue only existing regulations.

IV.

The Regulations Deprive American Citizens of Their Freedom to Travel in Violation of the First and Fifth Amendments to the Constitution.

The regulations making expenditures for personal travel a felony carrying severe terms of imprisonment and criminal fines violate the constitutional liberty of international travel.

A. In five major decisions since 1958, this Court has expressly recognized that international travel, as well as interstate travel, is a constitutional right with First Amendment implications, a right protected by the due process clause of the Fifth Amendment. The first such decision was *Kent* v. *Dulles*, 357 U.S. 116 (1958), where the Court held that "[t]he right to travel is a part of the 'liberty' of which citizens cannot be deprived without due process of law under the Fifth Amendment." *Id.* at 125.

Relying heavily upon the writings of Professor Zechariah Chafee, the Court emphasized "how deeply ingrained in our history this freedom of movement is." *Id.* at 126. The Court further found that "Freedom of movement also has large social values," *id.*, and cited Professor Chafee's reminder that travel enables an American citizen to be "well informed in public issues" so that he is not "obliged to form his opinions about our foreign policy from United States government officials or "a few correspondents of American newspapers." *Id.* at 127.

This ruling that travel is a constitutionally-protected right was reaffirmed in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), *Zemel* v. *Rusk*, 381 U.S. 1 (1965), *United States* v. *Laub*, 385 U.S. 475 (1967), and *Haig* v. *Agee*, 453 U.S. 280 (1981). In each of those cases, the Court carefully analyzed the refusal of a passport, amounting to only a *deterrent* of travel, under heightened scru-

tiny as a restraint on a constitutionally protected liberty. Since the prohibition on the spending of money to travel to Cuba is, in fact, an absolute ban on travel for most Americans, it is subject to at least the same heightened judicial scrutiny. We do not understand petitioners to disagree."

B. The regulations challenged here cannot be sustained under the analysis of *Aptheker* and *Zemel* without sanctioning a power to limit international travel wholly inconsistent with our traditions and freedoms. Indeed, affirmance of the present restrictions would transform the Court's ruling in *Zemel*—which upheld limited restrictions in the extreme context of the Cuban missile crisis—into sanctions for permanent travel controls, not only to Communist nations, but to any nation, whenever the executive (ap-

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" *See, e.g.*, Br. 56-57 (defending regulations as "narrowly drawn restrictio[n]" serving "compelling" interest of "security of the nation"). To the extent that the government relies on *Califano* v. *Aznavorian*, 439 U.S. 170 (1978), any such reliance is misplaced. *Aznavorian* simply applied the rule that unintended, "incidental" burdens on protected rights arising as a consequence of otherwise valid welfare benefit statutes not aimed at the exercise of those rights will be upheld where no greater than necessary to accomplish the governmental aim. Thus, the Court in *Aznavorian* stressed that "[t]he statutory provision in issue here does not have nearly so direct an impact on the freedom to travel internationally as occurred in the *Kent*, *Aptheker*, or *Zemel* cases. It does not limit the right to travel on grounds that may be in tension with the First Amendment. It merely withdraws a governmental benefit. . . ." *Id.* at 177. The truly "incidental" restriction occasioned by the welfare benefits statute in *Aznavorian* can hardly be compared with or judged by the same standards as the regulation here, which is not an unintended and unavoidable burden on the right to travel, but rather a direct intentional curtailment of that right. The Court observed in *Zemel* that "we must, if we are to approach the constitutional issues presented by this appeal candidly, proceed on the assumption that the Secretary's refusal to validate a passport for a given area acts as a deterrent to travel to that area." 381 U.S. at 13-14. The government's claim that *Kent*—but not this case—"involved a direct and purposeful prohibition on the right to travel," Br. 53, forsakes *Zemel's* candor and functional approach for semantic tricks.

parently in its unreviewable discretion) deems them to be a convenient foreign policy tool.

1. The restriction here is far more substantial than those upheld in *Zemel* and *Agee*, or struck down in *Aptheker*. The government has not merely withheld its diplomatic protection for travel, either as to an individual or a particular country; instead, it has imposed severe criminal penalties on the spending of even minimal amounts of money for personal travel. For respondents and, indeed, for nearly all Americans,[90] the restriction is tantamount to—and, as a practical matter, indistinguishable from—a criminal penalty on travel itself. *See Buckley* v. *Valeo*, 424 U.S. 1, 16-19 (1976).

2. The area restriction upheld in *Zemel* was far less restrictive than the regulation challenged here, and it was also supported, this Court found, "by the weightiest considerations of national security. . . ." 381 U.S. at 16.[91] *Zemel*, as the Court noted, came in the wake of the Cuban missile crisis, and cannot be understood outside that context. As Professor Tribe has suggested, "the power approved in *Zemel* must be limited to the most extraordinary situa-

[90] Other than those of Cuban descent.

[91] The Court referred to the executive's determination "that travel between Cuba and other countries of the Western Hemisphere is an important element in the spreading of subversion" and that "in the early days of the Castro regime, United States citizens were arrested and imprisoned without charges," 381 U.S. at 14-15, citing the statute authorising extraordinary powers to secure the release of such persons. *Id.* It held that "the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel." *Id.* It analogised the Cuban situation to "areas ravaged by flood, fire or pestilence," suggesting that in such situations, "when it can be demonstrated that unlimited travel to the area would indirectly and materially interfere with the safety and welfare of the Nation as a whole," the right to travel could be restricted. *Id.* at 15-16.

tions." L. Tribe, *American Constitutional Law* 957 n.22 (1978).

A decision upholding the present regulation would not limit the executive's authority to "emergency" situations. To the contrary, Congress specifically found in enacting the National Emergency Act, IEEPA, and the 1978 amendment to the Passport Act, that there *is* no emergency at present, only the "normal" tensions inherent in contemporary international affairs. Thus, upholding these regulations would inevitably insulate from constitutional attack any geographic travel bans based on the interest of reducing another nation's hard currency earnings by eliminating American travel expenditures.

Given this threadbare justification, we are unable to discern (and the government does not provide) any limiting principle which would prevent petitioners from prohibiting travel expenditures even to friendly countries in order to pressure changes in their policies.[33] Travel expenditures to Israel, for example, could be forbidden to express disapproval of, and induce a change in, Israeli West Bank policy; to England to pressure surrender of the Falklands; or to Italy to cajole the government to exclude Italian Communists from the Cabinet. No member of the Court, though, has ever suggested that travel could be infringed on so flimsy a pretext; not only are the Court's own cases strongly to the contrary, but Congress' 1978 commitment to the right to travel through implementation of the Helsinki accords, *see infra* Point I, also forbids such an approach.

Moreover, the regulations challenged here, which block the exercise of a constitutional right on penalty of criminal prosecution, fail significantly to further the interest of denying revenues to Cuba. The annual hard currency value of travel to Cuba by United States nationals in the

[33] This is *precisely* the justification relied upon by defendants. JA 107-8, ¶¶ 8, 9 (Declaration of Myles Frechette).

year prior to the promulgation of the regulations amounted to only approximately $20 milion, JA 19, and the regulations by petitioners' own admission affect only $8 million of that total. By contrast, under current regulations, several hundred million dollars of hard currency are transmitted to Cuba every year by foreign-based affiliates of United States corporations. *Id.*[11] There is, then, not only a less restrictive alternative available to the government for achieving its goals, but an entirely non-restrictive alternative. *See Aptheker, supra.*

Finally, the third interest asserted by the government, "the ability [the restriction provides] to express serious disapproval of another country's behavior without the use of force through economic sanctions," cannot justify the regulations. First, it again proves far too much, since it would justify travel bans to any country with which our government has a dispute. Second, that justification is precisely the kind rejected by Congress, in 1978, in prohibiting the use not only of "ideological" but also of "political" rationales to justify area restrictions. *See supra* at 18-20. Moreover, the restriction is unnecessary to further that interest; the present administration's unambiguous expression of disapproval of Cuban conduct hardly

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[11] *See* Affidavit of Harold Mayerson, accompanying respondents' Opposition to Application for a Stay Pending Petition for a Writ of Certiorari (June 1983). Nor does the regulation rationally advance the government's additional stated goal of "deterring development of a strong Cuban tourism industry," Br. 56, precluding as it does those, like respondents, who are not the sort of travelers of which a tourist industry can be made. For example, respondent Fran Bradley sought to lead a trip of Quaker high school students to visit (and stay with) the Friends community in Cuba and a youth camp for international students. JA 82-94. Respondent Alice Hageman sought to lead a trip of lay people and clergy to study religion in Cuba. JA 75. *Compare Aptheker* v. *Secretary of State*, 378 U.S. at 512 (passport revocation overbroad since passports are withdrawn not only for travel to meet with Soviet officials in U.S.S.R. but also for innocent purposes). For description of the inadequacies of Cuba as a resort for the American market, *see* Mayerson Affidavit, *supra*.

requires amplification purchased at the cost of the constitutional right to travel.

In short, petitioners have not sufficiently shown that their regulations, which will severely curtail respondents' freedom to travel to Cuba, are necessary to further substantial government interests. Accordingly, even if authorized, the regulations must be found constitutionally invalid.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed. In the alternative, the matter should be remanded for further proceedings to permit respondents to demonstrate that the regulations are not sufficiently necessary to further substantial governmental purposes to survive constitutional scrutiny.

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APPENDIX A

Statutes Involved

The 1978 Foreign Relations Authorization Act §124; Pub. L. 95-426, §124, 92 Stat. 971, *now codified at* 22 U.S.C. §211(a), provides:

Limitation on Geographical Travel Restrictions in United States Passports

> Sec. 124. For the purpose of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for the purpose of encouraging other countries which are signatories to the Final Act to comply with those provisions, the first section of the Act entitled "An Act to regulate the issue and validity of passports and for other purposes", approved July 3, 1926 (22 U.S.C. 211a), is amended by adding at the end thereof the following: "Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

The International Emergency Economic Powers Act, 50 U.S.C. (Supp. V.) §§1701-1706, provides in relevant part:

> TITLE II—INTERNATIONAL EMERGENCY ECONOMIC POWERS
>
> Situations In Which Authorities May Be Exercised
>
> Sec. 202. (a) Any authority granted to the President by section 203 may be exercised to deal with any

unusual and extraordinary threat, which has its source in whole or substantial part outside the Unted States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 203 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

Grant of Authorities

Sec. 203. (a)(1) At the times and to the extent specified in section 202, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof.

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to,

or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

• • •

Consultation and Reports

Sec. 204. (a) The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this title and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Whenever the President exercises any of the authorities granted by this title, he shall immediately transmit to the Congress a report specifying—

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

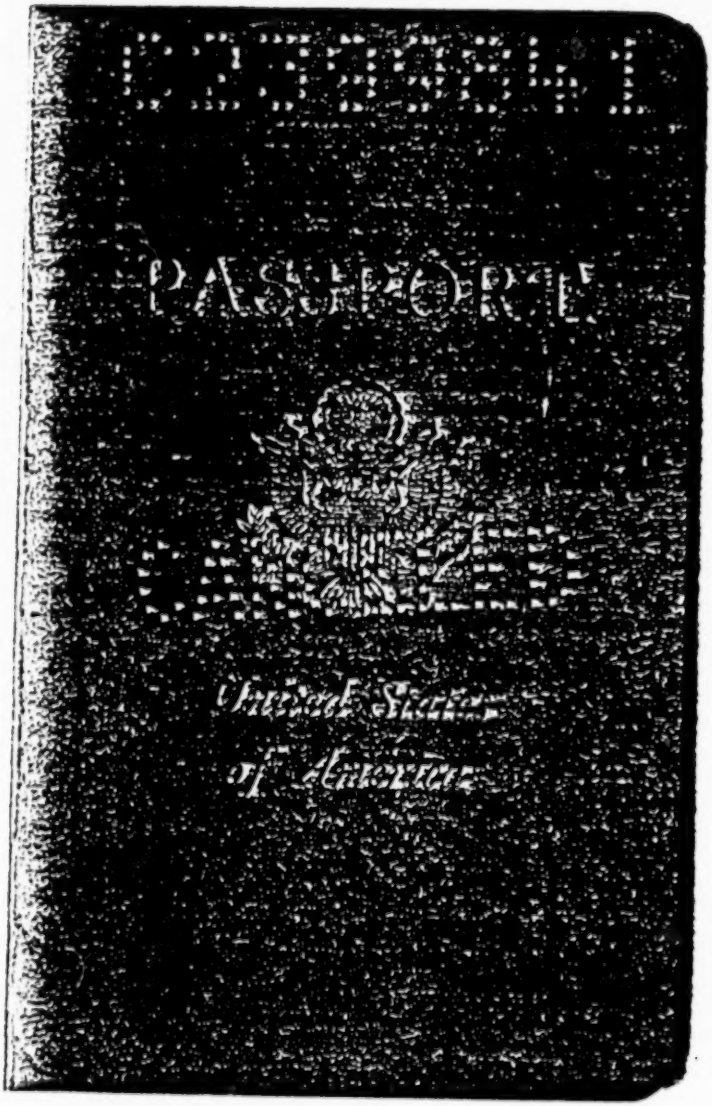
(c) At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) with respect to an exercise of authorities

under this title, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b).

Section 101(b) of Pub. L. No. 95-223, 91 Stat. 1625 (the "grandfather clause") provides:

Notwithstanding the amendment made by subsection (a) the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [Sept. 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

APPENDIX B


PASSPORT

I 480550

PASSPORT NUMBER

PEN AND INK ENTRY OF THE PASSPORT NUMBER BY THE BEARER

PLEASE FILL IN THE NAMES AND ADDRESSES BELOW.

BEARER'S ADDRESS IN THE UNITED STATES:

BEARER'S FOREIGN ADDRESS:

IN CASE OF DEATH OR ACCIDENT NOTIFY THE NEAREST AMERICAN DIPLOMATIC OR CONSULAR OFFICE AND:

Name

Address

IMPORTANT INFORMATION

This passport is the property of the United States Government and must be surrendered upon demand by an authorized representative of the Department of State. It is NOT VALID until signed BY THE BEARER on page two.

LOSS, THEFT OR DESTRUCTION OF PASSPORT. The loss, theft or destruction of a passport is a very serious matter and must be reported immediately to local police authorities and to the Passport Office, Department of State, Washington, D.C. 20524, or to the nearest American consular office. A new passport will be issued only after careful investigation which will entail considerable delay and may result in the issuance of a limited passport.

(CONTINUED ON LAST PAGE)

C2399841

The Secretary of State
of The
United States of America
hereby requests all whom it
may concern to permit the
citizen(s) of the United States
named herein to pass without
delay or hindrance and in
case of need to give said
citizen(s) all lawful aid and
protection

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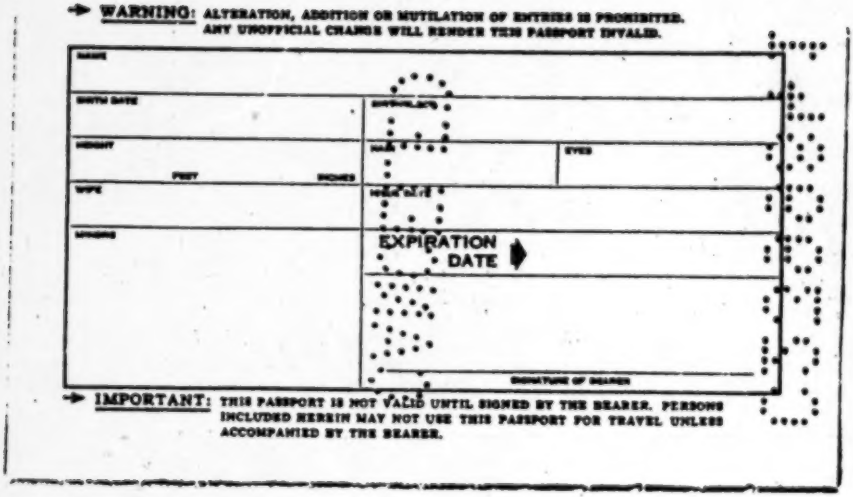
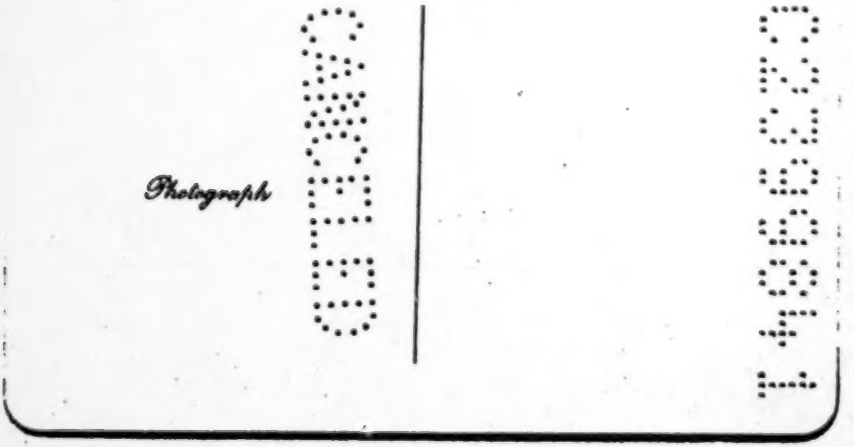

WARNING: ALTERATION, ADDITION OR MUTILATION OF ENTRIES IS PROHIBITED. ANY UNOFFICIAL CHANGE WILL RENDER THIS PASSPORT INVALID.
NAME
BIRTH DATE
HEIGHT
FEET
INCHES
TYPE
SPOUSE
NATIONALITY
SEX
EYES
REMARKS
EXPIRATION DATE
SIGNATURE OF BEARER
IMPORTANT: THIS PASSPORT IS NOT VALID UNTIL SIGNED BY THE BEARER. PERSONS INCLUDED HEREIN MAY NOT USE THIS PASSPORT FOR TRAVEL UNLESS ACCOMPANIED BY THE BEARER.


Photograph

PASSPORT

Notice

U.S. courts have interpreted U.S. law in effect on the date this passport is issued as not restricting the travel of a U.S. citizen to any foreign country or area.

However, the use of a U.S. passport for travel into or through any of the following areas is authorized only when specifically validated for such travel by the Department of State:

CUBA

NORTH KOREA

NORTH VIET-NAM

You should consult a passport agency or an American consular office to determine whether any changes have been made in the above list.

This passport must not be used by any person other than the person to whom issued or in violation of the conditions or restrictions placed therein or in violation of the rules regulating the issuance of passports. Any willful violation of these laws and regulations will subject the offender to prosecution under Title 18, United States Code, Section 1544.

CANCELED

Amendments and Endorsements

CANCELED

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IMPORTANT INFORMATION

EXPIRATION. This passport is valid for five years unless expressly limited to a shorter period. The expiration date is given on page two.

NEW PASSPORT. This passport should be presented when applying for a new passport.

TRAVEL IN DISTURBED AREAS. If you travel in disturbed areas, you should keep in touch with the nearest American consular office.

PROLONGED RESIDENCE ABROAD. If you reside abroad for a prolonged period, you should register at the nearest American consular office.

LOSS OF NATIONALITY. You may lose your United States nationality by being naturalized in, or by taking an oath or making a declaration of allegiance to, a foreign state; or by serving in the armed forces or accepting employment under the government of a foreign state. For detailed information, consult the nearest American consular office.

WARNING TO DUAL NATIONALS. A person is considered a dual national when he owes allegiance to more than one country at the same time. A claim to allegiance may be based on facts of birth, marriage, parentage or naturalization. A dual national may, while in the jurisdiction of the other country which considers him its national, be subject to all of its laws, including military service. If difficulties occur, consult the nearest American consular office.

ALTERATION OR MUTILATION OF PASSPORT. This passport must not be altered or mutilated in any way. You must not alter any dates or make any changes in your description, on the photograph, or on any other page of this passport. Alteration may make it INVALID and, if willful, may subject you to prosecution (Title 18, U.S. Code, Section 1543). Only authorized officials of the United States or of foreign countries, in connection with official matters, may place stamps or make statements, notations or additions in this passport. However, you may amend or update information supplied by you on the inside of the front cover of this passport, if necessary.

GENERAL INFORMATION

IMMUNIZATIONS. The International Health Regulations adopted by the World Health Organization stipulate that vaccination against smallpox, cholera, and yellow fever may be required as a condition of entry to any country. For return to the United States, a Smallpox Certificate will be required only if, in the preceding 14 days, a traveler has visited a country reporting smallpox. Many countries require entering travelers to possess a valid International Certificate of Vaccination against Smallpox. In addition, some countries require travelers to possess valid Cholera and/or Yellow Fever Certificates. Details concerning recommended and required immunizations and prophylaxis, for travel to all areas of the world, may be obtained from your local or State health department.

HEALTH INSURANCE. Persons contemplating travel abroad should contact their medical insurance company to determine what coverage, if any, they have while outside the U.S. Generally Social Security Medicare does not cover health care expenses outside the U.S.

CUSTOMS SERVICE. Know before you go. The pamphlet "Customs Hints" gives the current customs information about Customs requirements, and how they apply to articles acquired abroad. Obtain a copy from your nearest customs office or from U.S. Customs, P.O. Box 7118, Washington, D.C. 20044.

TREASURY. Treasury regulations prohibit the unlicensed purchase or importation of merchandise of Cuban, North Korean, North Vietnamese and Rhodesian origin. For information, write to the Office of Foreign Assets Control, Treasury Department, Washington, D.C. 20220.

AGRICULTURE. Your country into the United States will be speeded if you bring with you NO foreign meat, other animal products, fruits, vegetables, plants, soil, or other agricultural items. It is unlawful to import foreign agricultural items without permission, since they may be the means of introducing destructive plant or animal pests and diseases. For specific information, write "Quarantines," U.S. Department of Agriculture, Hyattsville, Maryland 20782.

U.S. GOVERNMENT PRINTING OFFICE

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